Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1995

JOHN HUBER

Petitioner,

v.

HOWARD COUNTY, MARYLAND

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May an employer that accepts volunteer services from individuals apply stricter physical and health standards to individuals being hired to do the same work in paid positions or is doing so evidence of discrimination on the basis of a disability.

2. May an employer in the field of public safety discriminate against employees who suffer from a disability that creates an increased *possibility* of injury but does not create a *probability* of injury.

LIST OF PARTIES TO PROCEEDINGS BELOW

This matter originated in the United States District Court for the District of Maryland. None of the parties is a private business entity. The parties to the case are noted in the caption.

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PETITION FOR WRIT OF CERTIORARI

John Huber, petitioner, by his undersigned counsel, respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit that was entered in this matter on May 24, 1995, in which a three member panel of the Court of Appeals held that, despite eight years of unblemished

experience as a paid and volunteer firefighter, the lower court was correct in concluding, as a matter of law, that asthma prevented Petitioner, John Huber, from functioning as a paid firefighter.

OPINIONS BELOW

There are three relevant opinions in this matter.

1. The District Court originally denied a motion to dismiss on August 4, 1993. The opinion is reproduced at App. 1.

2. The District Court's opinion granting summary judgment against the Plaintiff is dated April 15, 1994. The opinion is reproduced at App. 8. It was reported at *Huber v. Howard County, Maryland,* 849 F. Supp. 407 (D. Md. 1994).

3. The Fourth Circuit's per curiam opinion affirming summary judgment against the Plaintiff is dated May 24, 1995 and is reproduced at App. 27.

JURISDICTION OF THIS COURT

The final judgment of the United States Court of Appeals for the Fourth Circuit for which petitioners seek review was entered on May 24, 1995 and took effect June 15, 1995. This petition has been filed as required by Rule 13 of the Rules of this Court. This Court has jurisdiction to

review the judgment of the Court of Appeals by writ of certiorari under Rule 13 of this Court and under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The instant case involves the proper application of F.R.C.P. 56 and the Rehabilitation Act. The relevant portion of F.R.C.P. 56 is:

> A party against whom a claim . . . is asserted . . . may at any time, move for summary judgment.
>
> . . .
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Rehabilitation Act, 29 U.S.C. § 794 (1991 Supp.) provides:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

STATEMENT OF THE CASE

The instant case involves a claim of disability discrimination brought by John M. Huber against Howard County, Maryland. Huber has been and currently is a volunteer firefighter in Howard County. He applied to become a paid career firefighter. After approximately four years of volunteer service to the Howard County, he was hired by Howard County as a career firefighter in 1990. During his training in the fire academy, he was terminated by the County because of his asthma. Since his termination, Huber has continued to volunteer as firefighter in Howard County until the present time for a total of approximately eight years of experience in fire fighting and emergency medicine. The County has permitted him to continue his volunteer fire fighting. His volunteer activities have often been as time consuming as a full time career.

In the Howard County Department of Fire and Rescue Services there are numerous volunteer fire corporations that operate fire stations throughout the County. There are also County owned fire stations. This combination of stations is manned by volunteers, part-time

employees and full-time employees. Volunteer firefighters are authorized to and do perform all of the same duties as performed by full-time and part-time employees of the fire and rescue service.

Huber has brought suit against the County for violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794. That statute is the precursor and model for the Americans with Disabilities Act (hereinafter the "ADA"), 42 U.S.C. Section 12111, *et seq.*

A motion for summary judgment was filed by Howard County in which it argued that Plaintiff was not qualified to be a firefighter due to his asthma. The Honorable Frank A. Kaufman, District Judge, granted that motion and filed a memorandum which contained his reasoning. In short, the lower court engaged in the same prejudice against the handicapped that the laws against disability discrimination were intended to remedy.[1] The foundation for the lower court's decision was its finding, as a matter of law, that Huber could volunteer successfully as a firefighter but could not do the job of a paid firefighter. The Fourth Circuit Court of Appeals adopted the reasoning of the District Court's reported opinion. App. 32.

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[1]See School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is a suit arising out of §704 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794. The District Court had jurisdiction of this proceeding pursuant to 28 U.S.C. § 1331. The District Court issued its final judgment on April 15, 1994 and filed same with the Clerk on April 19, 1994. (An amendment to the Court's opinion was filed on April 28, 1994). The Court of Appeals for the Fourth Circuit had jurisdiction over the appeal of the District Court's judgment pursuant to 28 U.S.C. §1291. Huber's notice of appeal to the Fourth Circuit was timely filed on May 17, 1994. The Fourth Circuit judgment affirming the lower court was filed on May 24, 1995 and this petition was filed within the requisite ninety days.

ARGUMENT FOR GRANT OF THE WRIT

1. THE LOWER COURT ERRED IN ENTERING SUMMARY JUDGMENT IN THIS EMPLOYMENT DISCRIMINATION CASE WHEN IT IGNORED EIGHT YEARS OF UNBLEMISHED VOLUNTEER WORK EXPERIENCE AND HELD, AS A MATTER OF LAW, THAT A PERSON WITH SUCH EXPERIENCE WAS NOT QUALIFIED FOR THE JOB

BECAUSE OF A DISABILITY.

Huber has dedicated a substantial portion of his life for the past eight years to the service of his community as a volunteer firefighter. Except for a brief period of time while he was employed as a paid firefighter by Howard County, all of his services were rendered to the County free of charge. During that eight year period Huber has run hundreds, perhaps thousands, of fire related and medical emergency calls.[2]

In addition to Huber's eight year career as a volunteer firefighter in Howard County he was employed as a professional firefighter in the Town of Gamber, Maryland. He left that position to enter the fire academy and take a career firefighter position with Howard County. He had already received extensive training and was a nationally certified firefighter through Howard County but entered the recruit class at the academy as all new hires are required to do. When hired by the Howard County Huber passed a

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[2]As is common for firefighter/cardiac rescue technicians in Howard County, the majority of calls on which firefighter/CRTs go are medically related rather than related to fire suppression. Howard County does not dispute Huber's ability to perform cardiac rescue technician services. The County has not proffered any evidence that paid firefighters would have performed more or different services. Judge Kaufman acknowledged in his opinion that "In this case, it is not disputed that Huber performs ably as a volunteer fire fighter."

physical exam and agility test. He has also been employed as a cardiac rescue technician for the Maryland Ambulance Service, a private ambulance company.

The academy class in which Huber participated began in the winter of 1990. Part of the physical training involved running.[3] Since the class was being conducted in the winter the running exercises were conducted in very cold weather. During numerous running exercises over the course of several weeks Huber experienced some difficulties and finished behind the rest of the class on several occasions.

When Huber's asthma came to the attention of his training supervisor he was referred to a physician chosen by the County who stated that Huber appeared to be fit to undertake the physical stress of his proposed job. Huber was also sent to his long term personal physician who had been treating his asthma since his childhood. That physician, Dr. Kopper, also found that Huber was fit to continue working as a firefighter. The County then referred Huber to Dr. Michael G. Hays, a pulmonologist at Maryland General Hospital. During the meeting with Huber, Dr.

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[3]The agreed statement of facts in the record below indicates that a 13:00 minute standard for a one and one half mile run applied to recruits. However, documents located after said statement was agreed to indicate that the standard was quite different and much more flexible. Standard operating procedures of the County indicate that the physical agility standards for firefighters allow for times of 13 minutes 50 seconds up to 23 minutes 10 seconds depending upon the age of the firefighter.

Hays agreed that Huber was able to continue working as a firefighter. Nonetheless, Dr. Hays later changed his mind and wrote a report to the County which stated that Mr. Huber should not continue in that position. After receiving two reports from doctors saying that Huber could do the job and a third report from Dr. Hays saying otherwise, the County terminated Huber's employment. The County explained its actions by stating: "As a result of a pulmonary evaluation requested by Howard County it has been determined that you have a chronic medical condition that incapacitates you from the proper performance of your duties . . . ." Despite that statement, the County has never proffered any evidence that his condition ever impaired his volunteer activities or the actual performance of firefighting duties, before or after his termination. Moreover, the County did not take any steps to prohibit Huber from continuing to fight fires as a volunteer despite the legal authority to control who fights fires.

Huber has suffered from asthma since he was a child. He has received treatment for that asthma involving internal medications and inhalers known as bronchodilators. When Huber applied to the County in 1986 to be a volunteer firefighter he provided a letter from Dr. Kopper which stated that he was capable of performing the duties of a firefighter. When Huber applied for the career position as a firefighter with Howard County, he disclosed the fact that he had childhood asthma, reported an episode of asthma which occurred in 1986 and disclosed that he was using an

inhaler at the time of application.[4] As part of the hiring process, Huber was required to undergo a physical agility test which he passed.

When Huber's asthma became apparent during the fire academy running exercises the County ordered him to cease using his inhaler. This decision to deprive Huber of his medication was made by the Office of Personnel, not a physician. Indeed, that decision completely contradicted Huber's personal physician who had prescribed the medication. Moreover, there was no evidence in the record below that his inhaler created any risk.[5]

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[4]The Circuit Court criticizes Huber for not revealing in his application an asthmatic incident which occurred on May 25, 1989. App. 28. However, the Court also noted that the 1989 incident did not occur until after Huber filed his application. Therefore, it would have been impossible to report it on the application. Despite that reference in the Circuit Court opinion, there is no evidence that Huber committed any misconduct such as resume fraud or that he failed to disclose any material fact in his application.

[5]The Circuit Court misconstrued an argument made below regarding the inhaler medicine. The County originally claimed that the inhaler posed a risk of explosion. Petitioner established that the record contained no evidence that use of an inhaler posed a safety risk or a risk of explosion. However, the Circuit Court held that Huber failed to meet his burden of proof because he failed to present evidence that he could have used other medicine just as successfully. The Court missed the point because it failed to address the original misconception that the inhaler

Huber expected to call Dr. Gamble as an expert witness in the instant case and attached his report and portions of his deposition to his opposition to the County's motion. Dr. Gamble is a medical doctor and has a Master's Degree in public health from Johns Hopkins University. He is also board certified in occupational medicine. He also has undertaken extensive study of pulmonology. In Gamble's deposition and in his report he opined that Huber could perform the duties of a firefighter. In order to respond to concerns raised by the County, Dr. Gamble suggested certain accommodations that the County could undertake which could alleviate any concerns that it might have. Dr. Gamble opined in his deposition that if the reasonable accommodations he suggested were utilized the risk of problems resulting from Huber's asthma would be "less than 10%, maybe even less than 2%." Dr. Gamble further stated that with the accommodations[6] that he has

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Huber was using did not pose any risk of explosion or danger. Therefore there was no need for a change in the medicine. App. 37.

[6]Dr. Gamble suggests that if the County has concerns about Huber's asthma it could have one of the other fire fighters, all of whom are trained to use a stethoscope and listen to lungs evaluate Plaintiff on a daily basis to determine whether he is having a wheezing problem. Furthermore, when conducting firefighting activities at the scene of a fire, all fire fighters are required to report for rehabilitation to the ambulance on duty after exhausting a tank of air which is approximately 20 minutes. In addition to the normal check of blood pressure and heart rate the paramedics on sight would have the opportunity to listen to

suggested, there is "very little risk to himself or others, . . . very little risk at all."

Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C., Section 794 (a) (1991 supp.), states:

> No otherwise qualified individual with handicaps...shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

The Supreme Court has held that "[a]n otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap." *Southeastern Community College v. Davis,* 442 U.S. 397, 406 (1979).

Huber has proffered sufficient evidence from which a trier of fact could conclude that he has established a *prima facia* case under the Rehabilitation Act. Plaintiff has a handicap or disability within the meaning of the Rehabilitation Act. His eight years of experience as a firefighter establish that he is "otherwise qualified" for the position. The County's own affidavits and records establish

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Huber's lungs to determine whether there is any wheezing problem. At no point did Dr. Gamble testify that these tests were necessary. Rather, he suggested that if the County was truly concerned, it could alleviate those concerns easily and without any cost to it.

that Huber was terminated solely because of his asthma. Therefore, Huber has established a *prima facia* case of disability discrimination under the Rehabilitation Act. See generally, *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1379 (3rd. Cir. 1991).

Since Huber has established a *prima facia* case, the burden of proof shifts to the County to demonstrate that its reason for discharging Huber was legitimate and job related and that any possible accommodations would impose an "undue hardship" on its operations. *Prewitt v. United States Postal Service*, 662 F.2d 292, 308-310 (6th Cir. 1981).

The County alleged that Huber's termination was "motivated by legitimate business reasons." In making this assertion, the County was attempting to sidestep the standard applicable to disability discrimination cases. The federal regulations relating to the Americans with Disabilities Act are instructive on the use of qualification standards:

> It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

29 C.F.R. §1630.10. In other words, Huber cannot be fired because of his asthma unless the County establishes that the requirement of being free of asthma is "job-related" and "consistent with business *necessity*." (Emphasis added). See also 29 C.F.R. §32.14. In the instant case, the County cannot establish either requirement because it does not apply that standard to the volunteers or part-time employees. If it does not apply it to all firefighters, it cannot be considered job related or a business necessity.

In summary, Plaintiff's career as a volunteer establishes, as a matter of law, that he is qualified to be a firefighter. At a minimum, the facts related to that career require that the issue of disability discrimination be submitted to the trier of fact and prohibit resolution of the case on summary judgment.

The Supreme Court has not addressed the significance of volunteer work when evaluating whether a person is "otherwise qualified." In this case the employer applies strict physical and health standards to individuals it hires but does not apply those standards to volunteers and part-time employees doing precisely the same work. This case presents an opportunity to evaluate whether volunteer work should be considered when determining if an individual can do the job in question. In other words, the issue is whether an employer can create one set of standards for the people it will hire and another for people it will allow to volunteer to do the same work. If volunteer work and experience is probative of an individual's ability to do the job, summary judgment in this case must be reversed.

2. THE MERE *POSSIBILITY* OF INJURY DOES NOT JUSTIFY DISCRIMINATION AGAINST A DISABLED PERSON UNLESS THERE IS A *PROBABILITY* OF SUBSTANTIAL INJURY TO THE PLAINTIFF OR OTHERS.

The Code of Federal regulations creates a defense to a discrimination claim under the Americans with Disabilities Act when the disability in question creates a "direct threat to the health or safety of himself/herself or others." 29 C.F.R. §1630.2(r) and Appendix, §1630.2(r).[7] However, the regulations explain:

> An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, *i.e.*, *high probability*, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Report Labor Report at 56-57; House Judiciary Report at 45.
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> . . .

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[7]It does not appear that a comparable defense has been defined in the regulations for the Rehabilitation Act. See e.g., 29 C.F.R. §32.1 et seq., 45 C.F.R. §84.11, et seq.

> Such consideration must rely on objective factual evidence - not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes - about the nature or effect of a particular disability, or of disability generally. . . . Relevant evidence may include input from the individual with a disability, *the experience of the individual with a disability in previous similar positions*, and counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

29 C.F.R. Appendix §1630.2(r) (emphasis added). Thus, the regulations for the Americans with Disabilities Act specifically require that the disability pose a probability of injury instead of a mere possibility. Moreover, the fact finder must consider evidence presented by the individual involved regarding what he has done in similar positions. In the instant case, Huber has extensive experience doing the job of a volunteer. That evidence, in and of itself, prohibits the Court from entering summary judgment against Huber.

The County argues that Huber's asthma creates a future hazard or risk of substantial harm to himself or others. However, the evidence in the record establishes, at most, a mere possibility of such harm. No one would dispute that many conditions increase a firefighter's risk of injury. The fact that an individual is overweight, near-sighted, a smoker, flat-footed or has many other characteristics can be said to create an increase in the hazards of the job. However, the mere theoretical

possibility, especially in the face of eight years of problem free experience, is not sufficient to warrant the paternalistic attitude of the Howard County Fire Department. The affidavit of the County's physician must also be considered an inadequate basis for summary judgment because it is worded merely in terms of increased risk. That physician states: "Mr. Huber's asthma would still create a future hazard or risk of substantial harm . . . ." He also stated that he could not quantify whether that risk rises to the level of a probability.[8] Without more, Dr. Hays' affidavit and testimony simply does not constitute a sufficient basis for granting summary judgment against Huber.

The Supreme Court has never addressed the issue of whether the risk of harm must rise to the level of a mere possibility or whether it must rise to the level of a probability. Several other courts have addressed the issue. For example, in *B&O Railroad v. Bowen*, 60 Md. App. 299, 482 A.2d 921 (1984) the Maryland Court of Special Appeals dealt specifically with an employer's concerns that the employee's physical condition created a hazard of injury. The court held that the employer had the burden of persuasion to establish a "reasonable probability" that the employee's physical handicap would create a future hazard to his health or safety. The court held that evidence which

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[8]When pressed, Dr. Hayes did discuss in his deposition the issue of possibility versus probability but stated that he could not make predictions. Moreover, his opinion was entirely based upon the assumption that Huber would not be able to use his medication.

only rises to the level of a *possibility* of a "future hazard" is insufficient.

In *Office of Occupational Medicine and Safety v. Mayor & City Council of Baltimore*, 88 Md. App. 420, 594 A.2d 1237 (1991) a Baltimore City firefighter filed a complaint with the Community Relations Commission alleging that he was discriminated against by the Office of Occupational Medicine and Safety. The plaintiff was conditionally hired with his employment contingent upon his ability to pass a physical examination. X-rays revealed that the plaintiff had a bullet logged behind his sternum and that he suffered from a bone spur on a vertebrae. As a result of these conditions, his employment was terminated. The Court of Special Appeals held that the firefighter was unlawfully discriminated against based on a "perceived handicap" and that the employer failed to prove that he was precluded from performing the job of a firefighter. The Court considered the fact that the plaintiff had "performed similarly taxing jobs" and that he had worked as an Emergency Medical Technician after he was terminated from the Baltimore City Fire Department. The Court found that "the mere possibility of future harm" was insufficient.

In *Bucyrus-Erie Co. v. State, Department of Industry*, 90 Wis.2d 408, 280 N.W. 2d 142, 150 (1979), the same standard was applied. The Court taught that "if the evidence shows that the applicant has a present ability to physically accomplish the tasks which make up the job duties, the employer must establish to a reasonable *probability* that...employment...would be hazardous." (Emphasis added).

The job of a firefighter involves numerous risks to the life of the firefighter. Those risks could be reduced by hiring only employees with the physical strength of Charles Atlas and the speed of foot of Jessie Owens. However, society and generous individuals such as Huber have made the calculated judgment that it is reasonable to allow fire fighting activities to be performed by individuals of lesser physical abilities. Howard County, by its actions, has acceded to that judgment. Even individuals with serious diseases are capable of being firefighters.

In the instant case, Howard County must be held to apply the standards it has created. There is no factual dispute about those standards. That is, Howard County permits many individuals to provide fire fighting services to the County and its citizens without testing for asthma or imposing standards of physical abilities, endurance, speed or strength. Just as significant is the fact that part-time firefighters are paid by the County to provide fire fighting services without the County imposing any physical tests upon hire or thereafter. Therefore, the County has proven by its own actions that it is not essential that firefighters be able to run long distances in cold weather or be asthma free.

In enacting the Rehabilitation Act, the goal of Congress was "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." *School Board of Nassau County v. Arline*, 480 U.S. 273, 277 (1987) quoting 123 Cong. Record 13515 (1977) (statement of Sen. Humphrey). In support of this end, courts have sustained the claims of numerous individuals

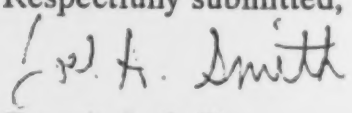
with handicaps in an attempt to afford them the same full lives enjoyed by able-bodied individuals. In *Arline*, the Supreme Court upheld the claim of a teacher who was discharged because she had tuberculosis. In *Nathanson v. Medical College of Pennsylvania,* 926 F.2d 1368 (3rd Cir. 1991) the Plaintiff brought suit under §504 because the medical school refused to accommodate her disability. The Court found that the plaintiff was "otherwise qualified," as a matter of law, because she had previously been allowed to matriculate in the same school. In other words, the defendant's actions in admitting her to the school at one point effectively prohibited it from contesting her qualifications later. This is similar to the instant case where Howard County has permitted Huber to work as a firefighter before and after his discharge. It cannot now contend that he is not otherwise qualified to do that which it has permitted him to do for such a long period of time.

John Huber has dedicated a large portion of the last eight years of his life to providing fire and emergency medical services for Howard County and its citizens. He has demonstrated unequivocally that he is capable of safely performing those services. The County must not be allowed to apply different standards for the people it is willing to pay full-time compared to the people it is willing to allow volunteer or pay part-time. The activities of the full-time, part-time and volunteer firefighters at the scene of an emergency are identical. By imposing separate standards for full-time firefighters it is, *per se*, discriminating against individuals with handicaps that it recognizes can perform all of the essential functions of the job.

CONCLUSION

The District Court and Court of Appeals for the Fourth Circuit misconstrued the law in an important respect. First, a person's work history as a volunteer must be considered in determining whether that person is capable of performing a particular job. In this case, Huber had worked successfully as a firefighter for approximately eight years. That fact alone constitutes sufficient evidence from which a reasonable jury could conclude that he is capable of doing the job even with his handicap. Second, the record below creates, at most, an inference that Huber's asthma may result in an increased possibility of harm. It does not rise to the level of a probability. Therefore, the decision below should be reversed.

Respectfully submitted,



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Dated: August 18, 1995

APPENDIX

OPINION OF DISTRICT COURT, August 4, 1993, Denying Motion to dismiss:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN HUBER

V.

CIVIL NO. K-93-606

HOWARD COUNTY, MARYLAND

Filed: August 4, 1993

Francis J. Collins, of Baltimore, Maryland, for plaintiff.

Barbara M. Cook, County Solicitor for Howard County, Richard E. Basehoar, Senior Assistant Solicitor for Howard County, and Rebecca A. Laws, Senior Assistant Solicitor for Howard County, of Ellicott City, Maryland, for defendant.

KAUFMAN, Senior District Judge.

MEMORANDUM AND ORDER

(1) On July 30, 1993, this Court held an on-the-record hearing in open court. For the reasons discussed during that hearing, Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment, and Defendant's Motion to Strike Request for Jury Trial, filed April 8, 1993, are DENIED.

(2) Specifically, defendant argued that § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, does not apply to the within case because the Howard County Department of Fire and Rescue Services, by which plaintiff was employed and discharged, did not receive federal financial assistance. However, the County Office of Emergency Management and Civil Defense, which is a part of the County Department of Fire and Rescue Services, did receive federal financial assistance during the time period in which plaintiff was employed by the Department of Fire and Rescue Services. Moreover, the salary of Richard Shaw, who served both as the Director of the Department of Fire and Rescue Services and as the Director of the Office of Emergency Management and Civil Defense, was partially funded by federal money. While the receipt of federal financial assistance by one department or agency of a county does not render the entire county subject to the provisions of § 504, and while such assistance to one department does not subject another department to the requirements of § 504, if one part of a department receives federal financial assistance, the whole department is considered to receive federal assistance so as to be subject to § 504. See e.g. Schroeder v. Citv of Chicago, 927 F.2d 957, 962 (7th Cir. 1991); Tanberg v. Weld County Sheriff, 787 F.Supp. 970, 974 (D.Colo. 1992). As this Court finds that the Department of Fire and Rescue Services received federal financial assistance during the time of plaintiff's employment and discharge, Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment on this ground is denied.

(3) Defendant also argued that the six months limitation period found in Article 49B of the Maryland Annotated Code should be applied in this case, as that statute is most analogous to the Rehabilitation Act. Defendant further contended that, applying that six months limitation period, plaintiff's claim is barred as plaintiff was discharged on March 19, 1990, but did not file the complaint in the within case until February 25, 1993. As discussed during the aforementioned hearing, this Court concludes that Maryland's general three-year limitation period for civil actions applies to claims under § 504. See Jones v. Frederick County Bd. of Educ., 689 F.Supp. 535 (D.Md. 1988); Cf. Burnett v. Grattan, 82 L.Ed.2d 36, 45 (1984) (applying six months limitation period from Article 49B to action brought in a federal court under the Reconstruction-era Civil Rights Acts, 42 U.S.C. §§ 1981 et seq., is not appropriate in view of differences between the administrative proceeding contemplated by Article 49B and a civil action in a federal court). Thus, plaintiff's claim is not barred by limitations, and Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment on this ground is denied.

(4) Defendant asserted that compensatory damages for pain and suffering, mental anguish, humiliation, or embarrassment, and punitive damages are not available under the Rehabilitation Act. Defendant further contended that as only equitable relief is available, plaintiff has no right to a jury trial.

In Eastman v. Virginia Polytechnic Institute, 939 F.2d 204 (4th Cir. 1991), the Fourth Circuit held that

compensatory damages for pain and suffering and punitive damages are not recoverable under § 504 of the Rehabilitation Act. In the course of its opinion, the Fourth Circuit analogized actions under § 504 to actions under Title VI and Title VII, concluding that Title VII "has consistently been limited to allow only equitable relief" and inferring legislative intent from that, and concluding that Title VI and § 504 should be similarly limited. Id. at 208. The Fourth Circuit noted the decision of the Eighth Circuit in Miener v. State of Missouri, 673 F.2d 969 (8th Cir.), cert. denied, 459 U.S. 909, 74 L.Ed.2d 171 (1982), which concluded that § 504 does permit a broad range of compensatory damages, and which proceeded from the proposition that "the existence of a statutory right implies the existence of all necessary and appropriate remedies." Miener, 673 F.2d at 977 (quoted in Eastman, 939 F.2d at 207). However, the Fourth Circuit did not follow Miener.

Subsequent to the Fourth Circuit's decision in Eastman, the Supreme Court decided the case of Franklin v. Gwinnett Cy. Pub. Schools, 117 L.Ed.2d 208 (1992), in which the Court held that a money damages remedy is available for an action brought under Title IX, based, in part, on the presumption in favor of the availability of any appropriate relief for violation of a federal right. In so doing, the Court discussed the similar treatment of Title IX, Title VI, and § 504. Further, the Court, in discussing its prior decision of Guardians Assn. v. Civil Service Comm'n. of New York City, 463 U.S. 582, 77 L.Ed.2d 866 (1983), commented: "Though the multiple opinions in Guardians suggest the difficulty of inferring the common ground among

the Justices in that case, a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action." Franklin, 117 L.Ed.2d at 220. Section 504 expressly incorporates the "remedies, procedures, and rights set forth in title VI." 29 U.S.C. § 794a(a)(2).

In that context, during the July 30, 1993 proceeding, this Court proposed, and both counsel agreed upon, the following procedure: At trial, this Court will use a jury to hear and evaluate evidence of compensatory and punitive damages and render special verdicts pursuant to Federal Civil Rule 49(a). However, this Court will also make its own independent determinations, but may utilize the jury's verdict as advisory. If the jury's verdict is different than this Court's, this Court will utilize its own verdict, and will not permit damages other than back pay. See Eastman, supra; Turner v. First Hosp. Corp. of Norfolk, 772 F. Supp. 284, 288 (E.D. Va. 1991); Tull v. United States, 481 U.S. 412, 416-17, 95 L. Ed. 2d 365, 372-73 (1987). If either party desires to appeal in that regard, such party will have that opportunity, if that opportunity is timely and otherwise appropriately so exercised.

(5) During the aforementioned hearing, this Court raised the issue of whether plaintiff was "otherwise qualified." Specifically, this Court raised the comparison between this case and the case of Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1380 (3rd Cir. 1991), cited by plaintiff in this case, in which the plaintiff in

that case was considered to be "otherwise qualified," as defendant, the educational institution in that case, had allowed her to matriculate twice "without indicating at any time than Nathanson's [plaintiff's] physical problems would interfere with her ability to be a qualified medical student or physician." Id. In the within case, plaintiff asserts that he had been a volunteer employee for three years before his hiring and discharge by the Department of Fire and Rescue Services and that he has continued as a volunteer employee for the past three years after his discharge. In that context, this Court put three factual questions to counsel: 1) Are the duties of a volunteer employee of the Department of Fire and Rescue Services, specifically the duties of plaintiff, the same as the duties of a permanent employee? What are the differences, if any? 2) What specifically occurred at the academy regarding the physical performance exercise which defendant alleges plaintiff "failed," and why is plaintiff considered to have so failed? 3) What is the specific reason defendant gives for discharging plaintiff?

(6) During the hearing, this Court directed that all formal discovery be frozen and that counsel get together and enter into factual stipulations and informal discovery to the fullest extent possible. It was agreed that counsel would file a status report detailing the same and any formal discovery which they seek, by September 17, 1993. This Court will then decide what, if any, formal discovery is needed. It was further agreed that any discovery would be completed by December 1, 1993. All motions shall be filed by January 10, 1994, with responses due by January 24, 1994, and rebuttals, if any, due by February 4, 1994. A pre-trial conference is set for February 21, 1994 at 4:00 p.m.

Trial, tentatively a 2-3 day jury trial, is set to begin at 10:00 a.m. on March 14, 1994.

(7) Copies of this Memorandum and Order are today being mailed to counsel of record.

(8) IT IS SO ORDERED this 4th day of August, 1993

/s/ Frank A. Kaufman
Senior United States District Judge

OPINION OF DISTRICT COURT, April 15, 1994, Granting Howard County's Motion for Summary Judgment:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN HUBER

V. CIVIL NO. K-93-606

HOWARD COUNTY, MARYLAND

Filed: April 15, 1994

Francis J. Collins, of Baltimore, Maryland, for plaintiff.

Barbara M. Cook, County Solicitor for Howard County, Richard E. Basehoar, Senior Assistant Solicitor for Howard County, and Rebecca A. Laws, Senior Assistant Solicitor for Howard County, of Ellicott City, Maryland, for defendant.

KAUFMAN, Senior District Judge.

John Huber brings this suit under the Rehabilitation Act, 29 U.S.C. § 794, claiming that Howard County, Maryland, unlawfully discriminated against him when the County refused to hire Huber as a full-time firefighter because he suffers from asthma. For the reasons stated herein, this Court concludes that there are no material and relevant disputes of fact, and that, as a matter of law, Huber is not an otherwise qualified individual within the meaning

of the Act, nor did the County unreasonably fail to accommodate Huber's disability. Accordingly, this Court grants the County's pending motion for summary judgment.

FACTS

In Howard County, Maryland, firefighting services are provided by both volunteer fire corporations and career employees of the County's Department of Fire and Rescue. Volunteer firefighters are not required to meet all the requirements established for career firefighters or to participate in County sponsored training or testing. Rather, they may choose to limit the functions which they perform during a fire emergency.

Huber applied and was accepted for membership in the Ellicott City Volunteer Fireman's Association, Inc. in March of 1986, and in the West Friendship Volunteer Fireman's Association, Inc. in February 1987. Both of those non-profit, non-stock corporations are located in Howard County. As a volunteer firefighter, Huber successfully completed several training courses and also became certified as a cardiac rescue technician.

On March 30, 1989, Huber applied for the position of firefighter recruit with the County's Department of Fire and Rescue Services. Firefighter recruits attend an eighteen week fire academy conducted by that Department, after which they are called upon to complete a one year probationary period before being admitted to a career firefighter position. On November 11, 1989, as part of the individualized medical examination required of all firefighter

recruit candidates, Mr. Huber reported to an examining physician hired by the County that he had a history of "childhood" asthma and that he used an inhaler; nonetheless, the County doctor recommended Huber for hire. Huber began employment as a firefighter recruit on February 12, 1990.

As a firefighter recruit, Huber was required to participate in a training academy which had a physical fitness training program as one of its component parts. Male firefighter recruits were expected to run 1.5 miles in under 13 minutes. While a recruit's failure to meet the entry level standards in any one exercise did not necessarily result in the recruit's disqualification,[9] all recruits were required to pass a final agility test at the conclusion of the academy in order successfully to complete the recruit training program. Although firefighters are instructed not to run at the scene of a fire, the running exercises are meant to ensure that firefighters are physically fit to assume the demanding tasks otherwise required of them, such as pulling hoselines, throwing and raising ground ladders, opening holes in roofs and walls using an axe, gaining entry through a locked door, operating heavy duty extrication tools, and participating in salvage operations.

During physical training classes at the academy, Huber had difficulty performing several of the running exercises.

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[9] On April 28, 1994 the court filed a correction to a mistake that appeared at this point in the original opinion. That correction is incorporated into this version of the opinion.

On February 14, 1990, Huber had to use an inhaler/bronchodilator to assist his breathing during an exercise. Subsequently, he was referred for an additional medical examination, and on February 16, 1990, an internist issued a report stating that Huber appeared fit to undertake the physical stress of a firefighter's job, but suggested further evaluation in the light of Huber's performance problems during running exercises. On February 19, 1990, during physical training exercises, Huber failed to finish the 1.5 mile run in 13:00 minutes, taking instead 13:02 minutes. On February 22, 1990, Huber again experienced difficulty in the running exercise, had to use his inhaler, and told his instructor that he "didn't want to bring on anything" and that "I can't run the pace in cold weather so I slow down and continue running."

On that latter date, the County's Office of Personnel required Huber to report to his treating physician for an examination and asked that the physician provide an opinion as to whether Huber could perform firefighting work in an environment in which Huber was exposed to a variety of adverse conditions. On February 27, 1990, the physician responded to the County's questionnaire, stating that Huber could not perform the duties of a firefighter without medication to control his asthmatic condition. That physician also wrote that Huber "most likely" could perform firefighter duties with medication, but that "if there is any further question regarding his capability -- perhaps an evaluation by a pulmonologist or allergist would be appropriate."

On February 28, 1990, Huber was advised that he could not carry his inhaler during work hours. That day, Huber took 14:14 minutes to finish the 1.5 mile run, and the next day he had to stop running after one mile, telling his instructor that his legs hurt but that he had no trouble breathing. On March 5, 1990, Huber stopped running, stating that he needed to clear his lungs, and on March 6, 1990, he stopped running during an exercise and ended up finishing eight minutes slower than the average class time. During the physical training at the academy, other recruits also from time to time had difficulty completing the 1.5 mile run in the 13:00 time.

On March 1, 1990, the County referred Huber to the Director of Pulmonary Diseases at Maryland General Hospital, Dr. Michael G. Hayes, who examined Huber on March 2, 1990. Dr. Hayes subsequently wrote to the County recommending that Huber not be hired as a firefighter based upon the risk Huber would pose to himself and others with whom he would work. Dr. Hayes explained in an affidavit that given the demands on firefighters at the scene of a fire -- rapidly fluctuating temperature conditions, work at or near maximal heart rates, and exposure to toxic substances -- there is no medical plan which, if followed by Huber, would enable him to serve without a risk of future harm to himself or others.

On March 12, 1990, the County wrote to Huber, telling him that his employment would be terminated pursuant to Howard County Code Section 110(d)(4)(b) which provides for dismissal of an employee who has some permanent or chronic physical or mental ailment or defect

which incapacitates him from the proper performance of his duties. Huber was afforded a hearing prior to dismissal before the Director of the Department of Fire and Rescue Services, following which the Director filed charges of dismissal with the County's Personnel Officer requesting that Huber be discharged from employment. On March 19, 1990, the County's Personnel Officer advised Huber of his dismissal and of his rights of appeal. Huber did not file an appeal, and his termination became effective on March 23, 1990. Huber has continued his membership with the West Friendship Volunteer Fireman's Association, Inc. and currently works as a cardiac rescue technician/driver. Since his dismissal, Huber has been seen at least nine times by doctors for breathing problems and has been hospitalized for such problems on at least two of those occasions.

In this case, Huber has brought suit in federal district court against the County pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, claiming that the County unlawfully discriminated against him when it refused to accommodate his disability.[1] The County responds that plaintiff does not have a disability as defined under the Act, that it did not refuse to accommodate Huber, that Huber's condition could not be reasonably accommodated with medication, and that it did not act

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[1]Prior to the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344, 4360, the Rehabilitation Act referred to "handicapped" individuals rather than individuals "with a disability."

willfully and wantonly against Huber or discriminate against him. Defendant has moved for full summary judgment, and plaintiff has moved for partial summary judgment with respect to liability.

As set forth in Fed. R. Civ. P. 56(c), summary judgment may be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "'A mere scintilla of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely.'" Barwick v. Celotex Corp., 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting Seago v. North Carolina Theatres Inc., 42 F.R.D. 627, 640 (E.D.N.C. 1966), aff'd, 388 F.2d 987 (4th Cir. 1967), cert. denied, 390 U.S. 959 (1968)). In the absence of such a minimal showing, a party moving for summary judgment should not be required to undergo the expense of preparing for and participating in a trial of the issue challenged. See Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The burden is on the party moving for summary judgment to show that no genuine issue of fact exists and that the movant is entitled to judgment as a matter of law. Barwick v. Celotex, 736 F.2d at 958. The facts and the inferences to be drawn from the facts must be viewed "in the light most favorable" to the nonmoving party. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). Nevertheless, the Fourth Circuit has stated that, with regard to motions for summary judgment, trial judges have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial."

Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting Celotex, 477 U.S. at 323-24).

THE REHABILITATION ACT

The Rehabilitation Act provides that: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C.A. § 794 (West Supp. 1993).[2] Claims under the Rehabilitation Act are evaluated under the following proof scheme:

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[2]In a Memorandum and Order dated August 4, 1993, attached hereto and made a part hereof, as Appendix A, this Court held inter alia that the Howard County Department of Fire and Rescue Services received federal financial assistance during the time period in which plaintiff was employed by the County's Department of Fire and Rescue Services, and that therefore the Rehabilitation Act applies to plaintiff's claims. In that same Memorandum and Order, this court also decided a limitations defense asserted by defendant, dealt with the handling of certain damages issues, called for further development of the record, factually and legally, which counsel have so done, and set forth certain procedures concerning plaintiff's jury trial demand. The Court's said comments with regard to that jury demand were made without the benefit of the Fourth Circuit's opinion in Pandazides v. Virginia Bd. of Educ., 134 F.3d 823 (4th Cir. 1994).

> First, plaintiff must demonstrate that she is 'handicapped' within the meaning of the Act and pertinent regulations. Second, plaintiff must demonstrate that she is 'otherwise qualified' for the position at issue, see 29 C.F.R. § 1613.702(f) . . . and that she was excluded or discharged from the position solely because of that handicap. These two showings constitute the prima facie case. Third, if plaintiff satisfies her burden of demonstrating qualification under the Act, the burden shifts to defendant to show that the justifications offered for its refusal to accommodate plaintiff are 'job related' and that to make the necessary accommodation would impose an 'undue hardship' on its operations.

Walders v. Garrett, 765 F. Supp. 303, 308 (E.D. Va. 1991) (citations omitted), aff'd 956 F.2d 1163 (1992).

Disabled Person

The Rehabilitation Act defines a disabled person as one who "has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 706(8)(B)(i). Major life activities include "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1613.702(c) (emphasis added). Because asthma effects Huber's ability to breathe, it is well within the Regulation's definition of a handicap. See Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) (assuming,

without expressly deciding, that asthma is a handicap).

However, the Fourth Circuit, and other circuits, have also required that the courts make an individualized inquiry of "whether the particular impairment constitutes for the particular person a significant barrier to employment." Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986). In making that determination, the Court considers "'the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations.'" Id. at 933 (quoting Jasany v. United States Postal Service, 755 F.2d 1244, 1249 (6th Cir. 1985)) (emphasis added).

In this case, it is not disputed that Huber performs ably as a volunteer fire fighter. His certification as a cardiac rescue technician further demonstrates that various jobs other than a career firefighter are open to him, and that those jobs are in related fields to firefighting. Thus, Huber's condition does not substantially limit his employment opportunities in general. However, because Huber is disqualified from advancing the firefighting career for which he is well trained, and in which he has extensive background, his disability is substantially limiting as to being a career firefighter as such. Although a person's inability to fulfill one narrow job classification because of a physical or mental impairment does not constitute a disability, see Forrisi, 794 F.2d at 934, inability to perform specific job duties substantially limits a person's employment opportunities as to a job calling for performance of those duties. Such a person may have to seek a different job,

even if that calls upon him to alter his career path and/or to once again start at the bottom of the ladder. In that context, Huber has a disability which prevents him from performing the duties of a firefighter and is a disabled person as defined by the Rehabilitation Act.

In any event, regardless of whether or not he is disabled, Huber, as part of his prima facie case, must establish that he is an otherwise qualified disabled individual, ie., "a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . ." 29 C.F.R. § 1613.702(f). Whether Huber is "otherwise qualified" depends first upon, whether Huber can meet the "essential functions" of a firefighter, and second, whether the County's requirements appropriately measure those functions. Pandazides v. Virginia Board of Education, 946 F.2d 345, 349 (4th Cir. 1991).

The County asserts that Huber cannot fulfill the essential functions of a firefighter because, as Dr. Hayes concluded, Huber's asthma poses the risk that he may be incapacitated at the scene of a fire when confronted in an outdoor environment with a variety of allergens, variable weather conditions, including cold weather, and hazardous and toxic fumes and substances. Huber does not contest Dr. Hayes' assessment of the risks involved in firefighting, but responds that he is otherwise qualified because he can and has performed the functions of a volunteer firefighter for eight years.

However, the position of a volunteer firefighter differs in several important ways from that of a career firefighter. To begin with, the volunteer corporations are funded separately from the County department and have their own membership standards. Most importantly, unlike County firefighters, volunteer firefighters have the discretion of not responding to a fire and Huber has stated in depositions that he has, on numerous occasions, declined from going on calls because he was not feeling well. Career firefighters simply do not have that discretion. Finally, Huber's performance as a volunteer is not necessarily indicative of his future performance given the unpredictable nature of asthma, which in Huber's case, according to his own expert, is cold and exercise induced, conditions which are faced by firefighters. Huber simply may not impose the standards of a volunteer firefighter upon the County in the light of the differences between the two jobs. Rather, he must demonstrate that he is qualified to serve in the specific job at issue. See DiPompo v. West Point Military Academy, 770 F. Supp. 887, 892 (S.D.N.Y. 1991), aff'd 960 F.2d 326 (1992); Walders, 765 F. Supp. at 313.

As to the second level of the "otherwise qualified" inquiry, whether the employer's requirements are representative of the essential functions of the job, this Court concludes that the County's requirement that firefighters not have a chronic medical condition such as Huber's is directly linked to the duties which inhere in the position of a County firefighter. In Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1135-36 (4th Cir. 1988), plaintiff, an individual with a history of back problems, sued under 42 U.S.C. §§ 1981, 1982, and 1983 claiming that he

was unlawfully discriminated against on the basis of race when he did not receive a position as a volunteer firefighter. The jury found for the defendant, and the Court, utilizing the standards of the Rehabilitation Act, stated that the jury's verdict was supported by overwhelming evidence that the plaintiff was not physically suited to be a firefighter. In the case now before us, the uncontradicted evidence in this record, as did the evidence in Mullen,

> serves only to confirm a fact that is selfevident -- firefighting is strenuous, hazardous, demanding work. [Firefighters] must wear heavy protective gear in fighting fires, and are often required to lift heavy loads. Dependable firefighting services are crucial to the public, and the danger involved in the work requires that each firefighter be confident in the abilities and stamina of his fellow workers. Firefighting is simply a job for which physical fitness is a most basic qualification.
>
> . . . Some conditions simply are not compatible with certain lines of work.

Id. at 1135-36. Huber has not provided or even preferred evidence that he can perform a most essential function of a career firefighter, namely to be available, in a healthy physical condition at any, random moment during a shift -- "in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). Thus, in terms of the Act, Huber is not "otherwise qualified" unless his would-be

employer can reasonably accommodate him in the performance of the job.

Reasonable Accommodation

A disabled individual may be qualified under the Act if provided by his employer with reasonable accommodation in the handling of his disability. Thus, the question arises as to whether Huber can perform the essential functions of a firefighter with such accommodation and if so, whether the County has failed reasonably to accommodate him. "[P]laintiff bears the burden of demonstrating that she could perform the essential functions of her job with reasonable accommodation." Walders, 765 F. Supp. at 312 (citations omitted). While plaintiff has produced evidence that he could perform most of the essential functions of the job with accommodation by the County, he has not shown that the type of accommodation which would be necessary would also be reasonable.

Huber states that the County failed to accommodate him when it denied him use of his inhaler during exercises at the academy. However, an exhibit provided by Huber, apparently from a Physician's Desk Reference, states that his brand of inhaler should not be used or stored near open flame and that exposure to high temperatures could cause bursting of the device. In the light of these facts, the County has not acted unreasonably in determining that such device would be improper if used at the scene of a fire. Further, Huber does not contest the fact that, in denying Huber use of his inhaler during exercises, the County was concerned with how a firefighter, at the scene of a fire,

would use an inhaler, given the breathing apparatus, helmet, facepiece and gloves a firefighter wears, and that the County was also concerned with how long it would take for such medication to have effect. Thus, Huber has provided no evidence that the County's direction regarding the inhaler was not job related or supported by legitimate safety concerns; rather, the opposite appears true. "An employer is allowed to consider potential safety risks to applicants co-workers, and others in making a decision about employment criteria." Serrapica v. New York, 708 F. Supp. 64, 73 (S.D.N.Y. 1989), aff'd 888 F.2d 126 (1989).

Beyond the medication controversy, Huber has provided the opinion of Dr. James L. Gamble, a specialist in occupational medicine, who states that Huber could perform the duties of a firefighter with several accommodations, above and beyond permitting use of the inhaler. According to Dr. Gamble, the County could have other firefighters, who are trained to use a stethoscope, evaluate Huber on a daily basis to determine whether he is having a wheezing problem, and if he is having a problem he could be referred to the fire department's medical department for further determination of his work status. At the scene of a fire when the firefighters report for rehabilitation, the paramedics on sight could listen to Huber's lungs to see if there is a wheezing problem. Again, if he is found to have a problem he could report to the firefighter's medical department. Dr. Gamble states that the with those accommodations, the risk of any sort of problem would be less than ten percent.

However, an employer need not make accommodations which "would result in an undue hardship," to the employer. Walders, 765 F. Supp. at 313. The accommodation urged by Huber would appear to add up to just that. To begin with, contrary to Dr. Gamble's assumption, the County fire department has no on-site medical department or rehabilitation center, and commonsense suggests that establishing and maintaining such departments to accommodate plaintiff would entail substantial cost. Moreover, the fact that plaintiff's lungs are clear at the start of the day would not guarantee that Huber's lungs would remain clear at the scene of a fire or at any other time during a work shift. Even if Huber were further examined at the site of a fire, his potential incapacitation could require that he be removed from service. That contingency would mean that the County would have to increase its staffing requirements at stations to which Huber is assigned in order to have enough active firefighters at the scene. An accommodation which permits an employee to work only when his or her impairment permits is not reasonable in a job, such as firefighting, where active attendance and immediate, undelayed participation is crucial. See Walders, 765 F. Supp. at 310 ("[P]laintiff's supervisors could not count on her attendance or predict her absences. In these circumstances, plaintiff could not effectively perform her job functions.").

Huber's requested accommodation would also pose an undue burden upon the County in the light of the fact that the County provides only one day of disability leave a month, which experience has shown will not be enough to accommodate Huber. During training as a recruit, Huber

was often incapacitated for several days within a single month. Providing Huber with extra disability days would affect staffing and hours of the other firefighters.

It bears repeating that the applicable regulation defines an otherwise qualified person as one who, with or without reasonable accommodation, does not pose a safety or health risk to others. Numerous cases have held that an individual who is at risk of danger to himself or others is not otherwise qualified. For instance, in DiPompo, 770 F. Supp. at 887, a plaintiff who suffered from dyslexia sought to be employed as a firefighter at the U.S. Military Academy. The job required reading and identifying words and symbols in a wide variety of emergency and non-emergency situations, a requirement with which plaintiff could not comply. Because his disabilities "could pose a significant danger to others and to himself in emergencies," the court concluded that DiPompo could not perform the essential functions of the job. Id. at 894. See also Ward v. Skinner, 943 F.2d 157 (1st Cir. 1991), cert. denied, 112 S. Ct. 1558 (1992) (epileptic taking anticonvulsant medicine is not otherwise qualified to drive commercial vehicles even though risk may be small); Serrapica, 708 F. Supp. at 72-73 (insulin-dependant diabetic not otherwise qualified to operate a sanitation truck); Davis v. Meese, 692 F. Supp. 505, 518-19 (E.D. Pa. 1988), aff'd 865 F.2d 592 (1989) (insulin-dependent diabetic not otherwise qualified for a job with the FBI as a special agent or investigative specialist); Salmon Pineiro v. Lehman, 653 F. Supp. 483, 493 (D.P.R. 1987) (plaintiff who suffers seizures not otherwise qualified for job of criminal investigator with Naval Investigative Services where job involves use of firearms, apprehension of

suspects, and surveillance under stressful conditions). Dr. Gamble, Huber's own proffered expert witness, states that even with the suggested accommodation, Huber would pose a ten percent risk of danger to himself or others, and that expert view does not address the risks which would be involved if Huber could not use or access his inhaler at the scene of a fire. Thus, even evaluating the evidence in the light most favorable to Huber, it would appear that, at the very most, with some accommodation, Huber could perform as a firefighter on many occasions, but not all of the time. In the life and death circumstances facing firefighters, the County does not have to assume such a ten percent risk even disregarding Huber's requested, and potentially costly, accommodation.

Huber's enthusiasm, sincerity, and commendable desire to serve his community, as well as the competent work he has done as a volunteer firefighter, all deserve to be noted and taken into account. But the Rehabilitation Act and its ensuing caselaw provide that the County need not accommodate Huber's disability where so to do would result in an undue burden for the County and a risk of harm to Huber himself, to his fellow firefighters, and to the general public. Accordingly, the County is entitled to the summary judgment which it seeks.

/s/ Frank A. Kaufman
Senior United States District Judge

ORDER OF DISTRICT COURT, April 15, 1995, Entering Judgment for Howard County:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN HUBER

V. CIVIL NO. 93-606

HOWARD COUNTY, MARYLAND

ORDER

Summary judgment is hereby entered for defendant. It is so ORDERED this 15th day of April, 1994.

/s/ Frank A. Kaufman
Senior United States District Judge

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS, May 24, 1995, Affirming District Court:

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN HUBER,
Plaintiff-Appellant,

v.

HOWARD COUNTY, MARYLAND,
Defendant-Appellee.

No. 94-1651

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge.
(CA-93-606-K)

Argued: April 5, 1995

Decided: May 24, 1995

Before RUSSELL, and LUTTIG, Circuit Judges,
and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Francis Joseph Collins, KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland, for Appellant. Richard Edwin Basehoar, Senior Assistant County Solicitor, Ellicott City, Maryland, for Appellee. **ON BRIEF:** Barbara M. Cook, Howard County Solicitor, Louis P. Ruzzi, Senior Assistant County Solicitor, Ellicott City, Maryland, for Appellee.

OPINION

PER CURIAM:

Plaintiff-Appellant John Huber appeals the district court's decision granting summary judgment to Defendant-Appellee Howard County, Maryland, on Huber's claim that the County unlawfully discriminated against him under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, when the County terminated him from his position as a firefighter recruit because he suffers from asthma. We affirm.

I.

The district court's opinion contains a thorough discussion of the undisputed facts in this case. *See Huber v. Howard County, Md.*, 849 F. Supp. 407, 409-11 (D. Md. 1994). We restate below the important facts relevant to this appeal.

Huber applied and was accepted for membership in the Ellicott City Volunteer Fireman's Association, Inc., in March 1986, and in the West Friendship Volunteer Fireman's Association in February 1987. Both of these associations are located in Howard County. Huber performed ably as a volunteer firefighter, and he successfully completed several training courses and became certified as a cardiac rescue technician (CRT).

On March 20, 1989, Huber applied for the full-time paid position of Firefighter/CRT Recruit with the Howard County Department of Fire and Rescue Services (DFRS). On November 11, 1989, as part of an individual medical examination required of all recruits, Huber reported to a County physician, Dr. Antonio D. Talusan, that he had a history of "childhood" asthma, that he used an inhaler known as a bronchodilator, and that he had experienced an asthmatic episode in 1986. Huber did not report that he had experienced an asthmatic episode requiring hospital treatment on May 25, 1989. Dr. Talusan rec-

ommended Huber for hire, and Huber began his training as a firefighter recruit on February 12, 1990.

As a recruit, Huber was required to participate in a physical fitness training program in the fire academy. Male recruits were expected to run 1.5 miles in under 13 minutes. While a recruit's failure to satisfy the entry level standards in any one exercise did not necessarily disqualify the recruit, all recruits were required to pass a final agility test in order to complete the training program.

Throughout this physical training program, Huber had difficulty performing some of the running exercises. On February 14, 1990, Huber failed to complete the 1.5 mile run and needed to use an inhaler to aid his breathing during the exercise. The next day, Huber also failed to complete the run and was referred to Dr. Talusan for an additional medical examination. Dr. Talusan issued a report on February 16 stating that Huber appeared fit but suggesting further evaluation in light of Huber's breathing difficulties during the running exercises. On February 19, Huber took 13:02 minutes to complete the running exercise. On February 22, Huber again experienced difficulty in the exercises and had to use his inhaler.

Due to Huber's continuing problems and Dr. Talusan's suggestion for further examination, the County's Office of Personnel required Huber to report to his treating physician. On February 27, 1990, Huber's personal physician, Dr. James Kopper, a pediatrician,[1] responded in the Office's questionnaire that Huber "most likely" could perform the firefighting duties with medication but that he could not perform the duties without medication. He added that "if there is any further question regarding his capability—perhaps an evaluation by a pulmonologist or allergist would be appropriate." Joint Appendix (J.A.) 271.

On February 28, 1990, the Office of Personnel informed Huber that he could not carry his inhaler while participating in the fire academy. That day, Huber took 14:14 minutes to finish the 1.5 mile run, and the next day he stopped running after one mile, telling his instructor

[1]Huber was 21 years old at the time of his training.

that his legs hurt but that he had no trouble breathing. On March 5, Huber stopped running, stating that he needed to clear his lungs; and on March 6, he stopped running during a 2.2 mile running exercise and finished eight minutes behind the average class time. During these training exercises, other recruits had difficulty finishing the 1.5 mile run in 13 minutes.

On March 1, 1990, the County referred Huber to Dr. Michael G. Hayes, the Director of Pulmonary Diseases at Maryland General Hospital. Dr. Hayes examined Huber on March 2 and issued a written opinion on March 8, which stated:

> My impression is that Mr. Huber has significant bronchial asthma, which is not being very well controlled with medication. . . . Although I am unable to predict the course of his asthma, I can not honestly recommend that it would be safe for him or for the people that he worked with to have him function as a firefighter. . . . I strongly recommend that he not be hired as a firefighter.

J.A. 65. Dr. Hayes also submitted an affidavit for this proceeding, in which he stated that "based upon a reasonable degree of medical certainty," no medical plan or scheme would enable Huber to perform firefighting duties without a future risk of substantial harm to himself, his coworkers, or members of the public.

On March 12, 1990, the Director of DFRS informed Huber that he was proposing to the County to terminate Huber's employment. The Director did not propose Huber's dismissal because of his performance in the running exercises. Rather, the letter from the Director read, "As a result of a pulmonary evaluation requested by Howard County, it has been determined that you have a chronic medical condition that incapacitates you from the performance of your duties . . . ." J.A. 278. After a hearing, the Director determined that Huber should be dismissed. The County advised Huber on March 19, 1990, of his dismissal and rights of appeal. Huber did not file an administrative appeal, and his termination became effective on March 23, 1990.

On February 25, 1993, Huber filed this action in federal district court in the District of Maryland, alleging that the County violated

§ 504 of the Rehabilitation Act, 29 U.S.C. § 794,[2] when it discharged him from his position as a firefighter recruit. In a motion to dismiss or, in the alternative, for summary judgment, filed on April 8, 1993, the County asserted that Huber's claim of discrimination was time-barred under the Maryland statute of limitations that the County argued applied. By memorandum and order dated August 4, 1993, the district court held that Huber's claim was not barred by limitations. *See Huber*, 849 F. Supp. at 415.

Huber thereafter obtained an additional medical opinion from a specialist in occupational medicine, Dr. James L. Gamble, III. In forming his opinion of Huber's condition, Dr. Gamble examined Huber on January 24, 1994, and considered Huber's medical history, including his hospitalizations occurring after his dismissal in 1990. In his assessment dated January 24, 1994, Dr. Gamble wrote:

> I believe, ~~however~~, that his long history of fighting fires without significant problems and his history of several day onset of asthma, ~~however~~, provide evidence that accommodations could adequately protect him. The accommodations that I suggest are that the supervisors, who are all trained in auscultation, listen to him at the beginning of each work day of service. If they found wheezes, rhonchi or rales then he should be referred to their medical department, where further determination of his work status can be made. In addition, when he is exposed to smoke while fighting a fire and has to report to his rehabilitation center that the EMS technicians auscultate his lungs and again check for wheezes, rhonchis and rales. If he is found to have a problem, then he should again report to the firefighter's medical department for further evaluation. Therefore, within a reasonable degree of medical certainty, it is most improbable, that the patient

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[2]Section 504 of the Rehabilitation Act provides: "No otherwise qualified individual . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a).

would subject himself or others to injury as the result of his asthma with these accommodations.

J.A. 122 (strikeouts in original).

The parties filed cross motions for summary judgment on February 22, 1994. In an opinion dated April 15, 1994, the district court granted the County's motion for summary judgment. The court concluded as a matter of law that, within the meaning of the Rehabilitation Act, Huber was not otherwise qualified for the position of a career firefighter and the County did not unreasonably fail to accommodate Huber's disability. *See Huber*, 849 F. Supp. at 408-14.

II.

This Court reviews the grant of summary judgment *de novo*, applying the same standard as the district court. *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993). Under this standard, the facts and the inferences to be drawn from the facts must be viewed "in the light most favorable" to the nonmoving party. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). At the same time, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Having considered the briefs and arguments of the parties, we adopt the reasoning of the district court concerning the merits of Huber's claim under § 504 of the Rehabilitation Act. We therefore affirm the court's decision granting the County summary judgment for the reasons stated in the court's opinion below, *Huber v. Howard County, Maryland*, 849 F. Supp. 407 (D. Md. 1994). We proceed only to address Huber's specific objections to the district court's decision that the court did not address in its opinion.[3]

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[3]On appeal, the County argues that the district court erred in concluding that claims in Maryland under § 504 of the Rehabilitation Act are controlled by Maryland's general three-year limitations period codified in the Annotated Code of Maryland, § 5-101 of the Courts and Judicial

A.

First, Huber urges this Court to reverse the district court's summary judgment decision because the court violated Fed. R. Civ. P. 56(e) by relying on the County's affidavits, which were not based on the personal knowledge of the affiants. *See* Fed. R. Civ. P. 56(e);[4] *Catawba Indian Tribe of South Carolina v. South Carolina*, 978 F.2d 1334, 1342-43 (4th Cir. 1992) (reasoning that summary disposition is improper if based on affidavits that lack an affirmative showing of the affiants' personal knowledge), *cert. denied*, 113 S. Ct. 1415 (1993). Huber specifically contends that the court should not have considered the affidavits from Dr. Hayes, former DFRS Director Richard Shaw, current DFRS Director James Heller, and Howard County Personnel Analyst Nancy Shull because their affidavits contained portions that were not based on their personal knowledge. Huber failed to raise this deficiency before the district court, and he has thus waived any claim that the affidavits are deficient under Rule 56(e), absent a gross miscarriage of justice. *See DeCintio v. Westchester County Medical Ctr.*, 821 F.2d 111, 114 (2d Cir.) (stating that all the courts that have considered the issue have held that Rule 56(e) defects are waived on

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Proceedings Article. Relying on our decisions in *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994), and *McCullough v. Branch Banking and Trust Co.*, 35 F.3d 127 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995), the County contends that the six-month limitations period provided in § 9A(a) of Article 49B of the Annotated Code of Maryland should apply to Huber's claim. This six-month period covers the filing of administrative complaints of discrimination with the Maryland Human Relations Commission. Md. Code. Ann. art. 49B, § 9A(a). We need not address this issue because we agree with the district court's reasoning that, under the terms of the Rehabilitation Act, Huber was not otherwise qualified for the position of a career firefighter and the County did not unreasonably fail to accommodate his disability. *See Huber*, 849 F. Supp. at 408-14.

[4]Rule 56(e) reads in pertinent part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e).

appeal when no motion to strike is filed below), *cert. denied*, 484 U.S. 965 (1987); *Davis v. Sears, Roebuck & Co.*, 708 F.2d 862, 864 (1st Cir. 1983); 10A C. Wright et al., *Federal Practice and Procedure*, § 2738, 507-08 (2d ed. 1983).

Such a gross miscarriage of justice would not occur in this case. First, accepting as true Huber's allegations of defect in the Shaw, Heller, and Shull affidavits, we do not find that they warrant a judgment contrary to the district court's decision granting the County's summary judgment motion. Excluding the portions of these affidavits that Huber alleges are not based on personal knowledge would not alter this Court's judgment because the allegedly inadmissible portions are immaterial and are superseded by information in the parties' agreed statement of facts.[5] *Cf. Richardson v. Oldham*, 12 F.3d 1373, 1378-80 (5th Cir. 1994) (holding that errors under Rule 56(e) in considering or striking portions of affidavits at summary judgment were harmless); Wright, *supra*, at 468-69 (stating that the erroneous admission of an affidavit under Rule 56(e) does not require reversal of summary judgment if error is harmless). Furthermore, the allegedly inadmissible portions would not warrant reversing the district court because the court's opinion does not indicate that it significantly relied on the specific portions at issue. *See New England Anti-Vivisection Soc'y, Inc. v. United States Surgical Corp.*, 889 F.2d 1198, 1204 (1st Cir. 1989) (holding that Rule 56(e) error would be harmless because district court did not appear to rely on the affidavit at issue).

Second, contrary to Huber's contention, Dr. Hayes' affidavit does not violate Rule 56(e) because it is based on his personal knowledge gathered from analyzing Huber's medical records, reviewing a written description of the responsibilities of Howard County firefighters, personally taking a medical history from Huber, and conducting a physical examination of Huber. Huber argues that distinct portions of the affidavit fail to satisfy Rule 56(e) because Dr. Hayes relied on hearsay

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[5]This Court need exclude only the portions of the affidavits that allegedly violate Rule 56(e) because on a motion for summary judgment, the district court should disregard only the inadmissible portions and should consider the remaining portions. *Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 530-31 (5th Cir. 1992).

and on his characterization of firefighting duties, of which he did not have personal knowledge. Huber's allegations, however, do not demonstrate that Dr. Hayes' affidavit violates Rule 56(e). The parties do not dispute that Dr. Hayes is an expert witness, and the Federal Rules of Evidence provide special rules regarding the admissibility of the opinion testimony of experts. Although Rule 56(e) deficiencies in an affidavit are not remedied by resort to the Federal Rules of Evidence, Fed. R. Evid. 1101(b) makes the Federal Rules of Evidence generally applicable to all civil actions. We should therefore seek to reconcile the relevant rules so that they are not inconsistent. *M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 165 (4th Cir. 1992) (en banc) (reconciling Rule 56(e) and Fed. R. Evid. 705), *cert. denied*, 113 S. Ct. 2962 (1993).

Relevant to this case, Fed. R. Evid. 703 allows experts to base their testimony on data "made known to the expert," and "if of a type reasonably relied upon by experts in the particular field, . . . the data need not be admissible in evidence." Reading this rule in tandem with Rule 56(e) affects the parameters of the Rule 56(e) "personal knowledge" requirement for expert witnesses. In order for the affidavit of an expert witness to satisfy Rule 56(e), the witness need not have observed or participated in the gathering of the data underlying his opinion. Rather, the personal knowledge requirement hinges on whether the expert personally analyzed the data that was "made known" to him and formed an expert opinion based on his own assessment of the data within his area of expertise. *See Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 385-86 & n.10 (9th Cir. 1992) (holding that experts testified based on facts within their personal knowledge because they testified concerning their area of expertise); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1423 & n.15 (3d Cir.) (reasoning that expert need not have "eyewitness" account of underlying data in order for his affidavit to be based on personal knowledge), *cert. denied*, 502 U.S. 941 (1991).

We thus reject Huber's argument that Dr. Hayes' affidavit could not support a summary judgment motion because he relied on "hearsay" medical records and on information concerning the duties of Howard County firefighters. This data was properly "made known" to him, and he personally assessed the information in reaching his expert opinion regarding Huber's ability to perform the essential functions

of a Howard County firefighter. Accordingly, we find that all of Huber's arguments alleging Rule 56(e) violations lack merit, and we conclude that rejecting these arguments does not result in a miscarriage of justice in this case.

B.

Second, Huber argues that the district court improperly concluded that the County reasonably prohibited him from using his inhaler because the court failed to consider the fact that his medication comes in non-flammable forms, which would not cause a danger in a firefighting emergency. Huber contends that any concerns about explosions and similar dangers from the use of his inhaler are irrelevant because the County could have avoided such problems by instructing Huber to use non-flammable medication. We cannot rely, however, on the ability of these non-flammable forms to provide a reasonable accommodation because Huber has not presented evidence demonstrating that these other forms would effectively control his asthmatic symptoms.[6]

Even assuming that Huber's symptoms could be controlled by other forms of medication, Huber's own expert, Dr. Gamble, suggested that Huber could perform the duties of a firefighter only with certain accommodations, above and beyond his use of medication.[7] In

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[6]Dr. Kopper stated in his 1990 letter to the County that Huber "at times" has received oral medication since his treatment for asthma beginning at age 5. In an earlier note written in 1987, Dr. Kopper also stated that Huber's asthma was controlled with "oral medication and an inhaler." Neither statement creates a genuine issue as to whether Huber's current symptoms could be treated solely with oral medication, or other non-flammable forms. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (holding that nonmovant must offer evidence on which jury could reasonably find for nonmovant).

[7]Huber originally argued in his complaint that the County need accommodate him only by allowing him to use his medication. Dr. Gamble's report, however, indicates that Huber would need the suggested accommodations, in addition to medication, in order to perform the essential functions of a firefighter. By relying on Dr. Gamble's accommodations, Huber thus effectively undercuts his argument that he could perform the essential functions with medication alone. Nevertheless, Huber has not demonstrated that non-flammable forms of medication would sufficiently control his symptoms. *See supra* note 6.

analyzing Dr. Gamble's recommended accommodations, we must determine whether these accommodations are reasonable and would enable Huber to perform the essential functions of a firefighter without endangering the health and safety of himself, his coworkers, or the public. *See* 29 C.F.R. § 1613.702(f) (defining an otherwise qualified disabled individual as one "who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others");[8] *see also Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 833 (4th Cir. 1994).

Huber asserts the district court improperly required him to prove that Dr. Gamble's accommodations protect against the mere possibility of future harm while he need only prove that the accommodations prevent "a probability of substantial injury." Appellant's Br. at 24. In this case, we need not determine whether Huber has proven that the accommodations enable him to perform the essential functions of a career firefighter without endangering himself or others because we agree with the district court's reasoning that Dr. Gamble's proposed accommodations are not reasonable and would cause undue hardship on the County.[9]

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[8]This regulation pertains to § 501 of the Rehabilitation Act, which refers to the duty of federal, rather than federally funded, employers to accommodate the disabled. This health and safety requirement under § 501, however, indicates the existence of such a requirement under § 504. *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991); *see also Carter v. Tisch*, 822 F.2d 465, 467 n.1 (4th Cir. 1987) (relying on 29 C.F.R. § 1613.702(f) in claim under § 504).

[9]Huber argues that the district court's using his record at the fire academy to predict Huber's need for extra disability days as a career firefighter was pure speculation and did not provide him with the view of the evidence in his favor. We find, however, that Huber's performance at the fire academy is highly relevant in predicting his readiness as a career firefighter. In contrast to his performance of his duties as a volunteer, Huber was obligated to perform the running exercises during the academy regardless as to whether he felt well each day. Moreover, the district court provided other reasons in its opinion, such as the County's need to provide extra firefighters to accommodate Huber's disability, which sufficiently demonstrate that Dr. Gamble's proposed accommodations would cause undue hardship on the County.

III.

For the foregoing reasons, we affirm the decision of the district court.

AFFIRMED.

(2)

No. 95-297

Supreme Court, U.S.
FILED
SEP 15 1995
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN HUBER,
Petitioner,

v.

HOWARD COUNTY, MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a firefighter recruit with chronic bronchial asthma may demonstrate that he is "otherwise qualified" under the Rehabilitation Act to perform the duties of a "career firefighter" by showing that he has performed the less stringent duties of a "volunteer firefighter" only when his medical condition has permitted, and when he acknowledges that he will require extraordinary accommodations to reduce the risk of substantial harm presented for himself and others.

II. Whether a firefighter recruit with chronic bronchial asthma may set forth a triable issue of fact under the Rehabilitation Act by showing that extraordinary accommodations will reduce, not eliminate, the likelihood that substantial harm will result to the recruit or others should he be employed as a "career firefighter", without also establishing the "reasonableness" of his proposed accommodations.

PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings before the United States District Court for the District of Maryland ("District Court") and the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit").

Howard County, Maryland ("County") is a chartered county formed pursuant to the legislative grant of authority contained in Article 25A of the Annotated Code of Maryland, and has no parent companies or subsidiaries.

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IN THE

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JOHN HUBER,

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HOWARD COUNTY, MARYLAND,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Howard County, Maryland ("County"), respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the Petitioner, John Huber ("Huber").

OPINIONS BELOW

The opinion of the United States District Court is reported at 849 F. Supp. 407 (D.Md. 1994) and is reproduced in the Petitioner's Appendix commencing at Pet. App. 1.[1] The per curiam opinion of the Fourth Circuit is reproduced in the Petitioner's Appendix commencing at Pet. App. 27.

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[1] References to the opinions below shall be to the appropriate page(s) of the Petitioner's Appendix and shall be designated as follows: (Pet. App. ——).

JURISDICTION

On April 15, 1994, the District Court granted summary judgment to the County upon Huber's claim that the County unlawfully discriminated against him under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehabilitation Act"), when the County discharged Huber from his position as a firefighter recruit on March 23, 1990. The Fourth Circuit upheld the District Court's judgment in an unpublished opinion dated March 24, 1995. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

29 U.S.C. § 794(a) provides, in pertinent part:

> "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. . . ."

STATEMENT OF THE CASE

A. Undisputed Facts.

In the District Court, the parties entered into a lengthy and detailed "Agreed Statement of Facts", which was supplemented with deposition testimony. The County also submitted evidence through affidavits which Huber did not dispute. The District Court's opinion contains a thorough discussion and summary of the undisputed facts (Pet. App. 9-15), as does the opinion of the Fourth Circuit (Pet. App. 28-32). Huber's Petition, oppositely, omits important facts and is replete with unsupported allegations and misstatements of fact. As a result, the Respondent sets forth below the undisputed facts which are relevant to the Court's consideration of the Petition.

The County is a chartered county formed pursuant to the legislative grant of authority contained in Article 25A

of the Annotated Code of Maryland (Resp. App. 1, ¶ 1).[2] Prior to the adoption of the charter form of government by Howard County voters in 1969, fire and emergency services in the County were performed solely by several volunteer fire corporations formed as non-profit corporations under Maryland law (Resp. App. 1, ¶ 2). In adopting the Charter, the voters of the County approved the creation of the County's Department of Fire and Rescue Services ("DFRS") (Resp. App. 1-2, ¶ 3). From that time to the present, fire and emergency services in the County have been provided both by the members of six separate volunteer corporations ("volunteer firefighters") and employees of DFRS ("career firefighters") (Pet. App. 9; Resp. App. 2, ¶ 4).[3]

Volunteer firefighters, however, are not required to meet the many requirements established for career firefighters. For example, volunteer firefighters are not required to pass physical fitness or agility tests, to participate in County sponsored training, to participate in physical training exercises, or to submit to physical agility testing and a medical examination on an annual basis. Volunteer firefighters may also choose to limit the functions which they perform during a fire emergency. Most significantly, unlike career firefighters, volunteer firefighters have the discretion of not responding to a fire (Pet. App. 9, 19; Resp. App. 4-5, ¶ 60-63).

In 1986 and 1987 respectively, Huber applied and was accepted for membership by the Ellicott City Fireman's Association, Inc. and the West Friendship Volunteer Fire-

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[2] Pertinent portions of the record before the District Court and Fourth Circuit are reproduced in the Respondent's Appendix. References to these materials shall be to the appropriate page(s) of the Respondent's Appendix, and the paragraphs thereof, if any, as follows: (Resp. App. ——, ¶ ——).

[3] At page 4 of the Petition, Huber incorrectly asserts that the volunteer corporations are part of DFRS, rather than separate and independent entities (Resp. App. 2, ¶ 4).

man's Association, two of the non-profit, non-stock corporations providing emergency services in the County (Pet. App. 9, 28).[4] As a volunteer firefighter, Huber thereafter successfully completed several training courses (Pet. App. 28).

On March 30, 1989, Huber applied to the County for the paid position of Firefighter/CRT Recruit ("Recruit") with DFRS (Pet. App. 9, 28). On November 11, 1989, during a medical examination required of all recruits, Huber reported to a County physician that he had a history of "childhood asthma", and that his last asthmatic episode had occurred in 1986. During this examination Huber denied taking oral medication for his asthma between 1986 and the time of the examination, but disclosed that he used an inhaler, a compressed gas cylinder used to dispense medication to the lungs. Huber did not disclose, however, that he had suffered a severe asthmatic episode requiring hospital treatment on May 25, 1989. Upon this flawed and incomplete history, the County physician recommended that the County hire Huber as a Recruit, and Huber began his training on February 12, 1990 (Pet. App. 9-10, 28-29).[5]

As a recruit, Huber was required to participate in a physical training program in the County's fire academy, which was intended both to physically prepare the re-

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[4] At pages 4 and 9 of the Petition, Huber incorrectly asserts both that he applied to the County to become a volunteer and that his volunteer service was given to the County. The volunteer corporations have their own membership standards (Pet. App. 19).

[5] At page 10 of the Petition, in footnote 4, Huber asserts that the Fourth Circuit wrongfully criticized Huber for misconduct akin to "resume fraud", and points out that Huber could not have disclosed his May, 1989 hospitalization on his March, 1989 application. Conspicuously, however, Huber offers no explanation here, and did not below, why the May, 1989 hospitalization was not reported in his November 1989 medical examination. This fact, of course, properly caused the Fourth Circuit to suggest that Huber may have intentionally misrepresented his medical history in order to be hired.

cruits and to measure their ability to perform the physically demanding duties of a career firefighter, such as pulling hoselines, throwing and raising ground ladders, opening holes in roofs and walls using an axe, gaining entry through a locked door, operating heavy duty extrication tools, and participating in salvage operations (Pet. App. 10, 29; Resp. App. 2-4, ¶ 48-60). Recruits were, for example, expected to run 1.5 miles in under 13 minutes. While a recruit's failure to meet this time requirement in any one exercise would not disqualify the recruit, all recruits were required to meet this standard in order to successfully complete the fire academy's training program (Pet. App. 10, 29).[6]

Huber, however, experienced great difficulty performing the running exercises in the Fire Academy, which began on February 12, 1990, even while using an inhaler for his asthma. On February 14, 1990, Huber needed to use an inhaler to aid his breathing during the exercise. The next day, Huber also failed to complete the run and was referred to the County's physician for an additional medical examination. The County's physician issued a report on February 16 stating that Huber appeared fit but suggesting further evaluation in light of Huber's breathing difficulties during the running exercises. On February 19, Huber took 13:02 minutes to complete the running exercise. On February 22, Huber again experienced difficulty in the exercises, had to use his inhaler, and told his instructor that he "didn't want to bring on anything" and

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[6] At page 8 of the Petition, in footnote 3, Huber now attempts to change the record and improperly suggests that he executed the Agreed Statement of Facts believing a 13:00 minute standard for a 1 1/2 mile running exercise was applied to recruits, but that he later located other documents indicating a more flexible standard applied. The document to which Huber refers, however, was referred to in Paragraph 60 of the Agreed Statement of Facts and attached as an Exhibit thereto. The standards referenced applied to firefighters who had successfully completed their recruit training, and who, unlike volunteer firefighters, are subjected to medical and fitness reviews on a continuing basis (Resp. App. 4, ¶ 60).

that "I can't run the pace in cold weather so I slow down and continue running" (Pet. App. 10-11, 29).

Due to Huber's continuing problems and the County physician's suggestion for further examination, the County's Office of Personnel required Huber to report to his treating physician. On February 27, 1990, Huber's personal physician, Dr. James Kopper, a pediatrician, responded in the Office's questionnaire that Huber "most likely" could perform the firefighting duties with medication but that he could not perform the duties without medication. Recognizing that as a pediatrician he lacked the qualifications to render a definitive opinion in the specialty of pulmonary medicine, Dr. Kopper added that "if there is any further question regarding his capability —-perhaps an evaluation by a pulmonologist or allergist would be appropriate." (Pet. App. 11, 29).[7]

On February 28, 1990, the County's Office of Personnel informed Huber that he could not carry his inhaler while participating in the fire academy. The County's decision was based in part upon the danger of explosion which existed if the compressed gas cylinder was exposed to the high temperatures of firefighting operations. The decision was also based upon the County's belief that the inability to predict fire emergencies, the delayed effectiveness of inhaled medication, and the difficulty which a firefighter would experience in accessing such medication during a fire emergency, where a firefighter is expected to use a breathing apparatus, helmet, facepiece, and gloves, renders the use of a bronchodilator incompatible with fire operations (Pet. App. 21-22).[8] That day,

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[7] At page 9 of the Petition, Huber wholly misrepresents the opinions of the physicians by suggesting that the County physician and Huber's pediatrician unqualifiedly stated that he was fit for duty as a career firefighter.

[8] At page 10 of the Petition, in footnote 5, Huber inappropriately aserts both that the Fourth Circuit misconstrued an argument which he made concerning his inhaler and that he established in

Huber took 14:14 minutes to finish the 1.5 mile run, and the next day he stopped running after one mile, telling his instructor that his legs hurt but that he had no trouble breathing. On March 5, Huber stopped running, stating that he needed to clear his lungs. Finally, on March 6, Huber stopped running during a 2.2 mile running exercise and finished eight minutes behind the average class time (Pet. App. 12, 30).

On March 1, 1990, the County referred Huber to Dr. Michael G. Hayes, the Director of Pulmonary Diseases at Maryland General Hospital. Dr. Hayes examined Huber on March 2, 1990 and issued a written opinion on March 8, which stated:

> My impression is that Mr. Huber has significant bronchial asthma, which is not being very well controlled with medication . . . . Although I am unable to predict the course of his asthma, I can not honestly recommend that it would be safe for him or the people that he worked with to have him function as a firefighter . . . . I strongly recommend that he not be hired as a firefighter.

(Pet. App. 30). Dr. Hayes also submitted an affidavit in this proceeding, in which he stated that "based upon a reasonable degree of medical certainty," and given the demands placed on firefighters at the scene of a fire, including rapidly fluctuating temperature conditions, work at or near maximal heart rates, and exposure to hazardous and toxic fumes and substances, there is no medical plan or scheme which would enable Huber to perform firefighting duties without a risk of substantial harm to himself, his co-workers, or members of the public (Pet. App. 12, 30).

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the District Court that the inhaler posed no risk of explosion. As the District Court noted in its opinion, however, Huber did not contest the legitimacy of the County's concerns, and himself introduced an exhibit, from a Physician's Desk Reference, indicating that exposure to high temperatures could cause bursting of the inhaler (Pet. App. 21).

On March 12, 1990, the County advised Huber that it was proposing to terminate his employment. The letter from the Director of DFRS advising Huber of this fact read, "As a result of a pulmonary evaluation requested by Howard County, it has been determined that you have a chronic medical condition that incapacitates you from the performance of your duties . . . ." After a hearing, the Director determined that Huber should be dismissed, and the County advised Huber on March 19, 1990, of his dismissal and rights of appeal. Huber, however, did not file an administrative appeal, and his termination became effective on March 23, 1990 (Pet. App. 12-13, 30).

After his discharge, Huber continued, from time to time, to provide some measure of service as a volunteer firefighter. He did so, however, only when his asthmatic condition permitted, and admitted in depositions that he had, on numerous occasions, declined from going on calls because he was not feeling well (Pet. App. 19). Following his discharge, Huber was also seen at least nine times by doctors for breathing problems and was hospitalized for such problems on at least two of those occasions (Pet. App. 13).

On February 25, 1993, Huber filed this action in the District Court alleging that the County violated the Rehabilitation Act. During this proceeding, some three years and ten months following his discharge, Huber obtained an additional medical opinion, not from a pulmonologist, but from a specialist in occupational medicine, Dr. James L. Gamble, III.[9] In forming his opinion of Huber's condi-

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[9] Notwithstanding the fact that the relative qualifications of the expert witnesses for both parties were not material to the decisions rendered below, Huber attempts at page 10 of the Petition to buttress the opinion of his expert by stating that Dr. Gamble has undertaken "extensive study" of pulmonology. The record evidence reveals, however, that Dr. Gamble is not a pulmonologist, has no affiliation with any hospital, devotes his practice to providing medical consultation and treatment for the clients of approximately 200 plaintiff's attorneys, and that his study of pulmonology

tion, Dr. Gamble examined Huber on January 24, 1994, and considered Huber's medical history. In his assessment dated January 24, 1994, Dr. Gamble noted specifically that Huber's asthma is cold and exercise-induced (Pet. App. 19), and wrote, in pertinent part:

> I believe, [however], that his long history of fighting fires without significant problems and his history of several day onset of asthma, [however], provide evidence that accommodations could adequately protect him. The accommodations that I suggest are that the supervisors, who are all trained in auscultation, listen to him at the beginning of each work day of service. If they found wheezes, rhonchi or rales then he should be referred to their medical department, where further determination of his work status can be made. In addition, when he is exposed to smoke while fighting a fire and has to report to his rehabilitation center that the EMS technicians auscultate his lungs and again check for wheezes, rhonchis and rales. If he is found to have a problem, then he should again report to the firefighter's medical department for further evaluation. Therefore, within a reasonable degree of medical certainty, it is most improbable, that the patient would subject himself or others to injury as the result of his asthma with these accommodations.[10]

(Bracketed words were stricken in original) (Pet. App. 31-32).

B. The Litigation.

On February 25, 1993, Huber filed this action in the District Court alleging that the County violated the Re-

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was limited to a single course during his residency program (Resp. App. 6-10).

[10] Dr. Gamble's proposed accommodations were based upon an erroneous assumption that the County had both a "medical department" and a "rehabilitation center." As the District Court correctly noted in its opinion, however, the record evidence indicated that the County had neither (Pet. App. 23).

habilitation Act when it discharged Huber from the position of firefighter recruit. The County filed, on April 8, 1993, a motion to dismiss or, in the alternative, for summary judgment, contending both that DFRS was not a recipient of federal financial assistance and that Huber's claim was time-barred. In raising the limitations issue, the County argued that the six-month limitations period in Section 9A(a) of Article 49B of the Annotated Code of Maryland should apply to Huber's claim. By a Memorandum and Order dated August 4, 1993, the District Court held that Huber's claim was not barred by the limitations period established under this section.

On May 24, 1995, the Fourth Circuit upheld the District Court's decision granting summary judgment to the County, and agreed with the District Court that Huber was not otherwise qualified for the position of a career firefighter, and that the County did not unreasonably fail to accommodate Huber's disability.[11]

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[11] Having reached this decision, the Fourth Circuit did not address the County's contention on appeal that Huber's claims were barred by limitations based upon the Fourth Circuit's decisions in *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994), and *McCullough v. Branch Banking and Trust Co.*, 35 F.3d 127 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995), both of which were entered after the District Court's decision on August 4, 1993.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT AND FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THE REHABILITATION ACT REQUIRED HUBER TO DEMONSTRATE THAT HE WAS "OTHERWISE QUALIFIED" TO PERFORM THE DUTIES OF A "CAREER FIREFIGHTER", AND THAT HE FAILED TO MEET THIS BURDEN BY SHOWING THAT HE HAD PERFORMED THE LESS STRINGENT DUTIES OF A "VOLUNTEER FIREFIGHTER" ONLY WHEN HIS CHRONIC MEDICAL CONDITION PERMITTED.

Huber first contends that his Petition for Writ of Certiorari should be granted because the Supreme Court "has not addressed the significance of volunteer work when evaluating whether a person is otherwise qualified" under the Rehabilitation Act. With much vitriol and without in any fashion distinguishing the authority upon which the lower courts relied, Huber also suggests at page 5 of his Petition that the District Court and Fourth Circuit "engaged in the same prejudice against the handicapped that laws against disability discrimination were intended to remedy". He simply argues, at page 14 of the Petition, that his performance of the less stringent duties of a volunteer firefighter alone establishes his qualification to perform the duties of a career firefighter in the County.

Huber's Petition should be denied, however, because the Petition ignores the burden which he was required to sustain under the Rehabilitation Act, as well as the differences between the positions of career and volunteer firefighter. To establish a case of employment discrimination, Huber was required in this case to show that he was an individual with a disability under the statute; that he was otherwise qualified,[12] which means that he could

[12] The lower courts correctly identified the applicable regulation to be 29 C.F.R. § 1613.702(f), which defines an otherwise qualified

perform the essential functions of the specific *job in question*; and that he was excluded from the employment *solely* [13] because of his disability. *See School Board of Nassau County v. Arline*, 480 U.S. 273, 287, n.17 (1987); *Walders v. Garrett*, 765 F. Supp. 303, 312 (E.D. Va. 1991), *aff'd*, 965 F.2d 1163 (4th Cir. 1992); *DiPompo v. West Point Military Academy*, 770 F. Supp. 887, 892 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 326 (2nd Cir. 1992). In *DiPompo*, in fact, the Court specifically rejected a contention that service as a volunteer firefighter established qualification for a career firefighter position where the requirements of the respective positions were not the same.

The difference between the positions of a career firefighter and a volunteer firefighter in this case are great, and ably summarized by the District Court in its opinion. First, as the District Court found, the volunteer corporations are separate entities who own their own stations and support their operations, in part, with money they raise themselves. As separate entities, the volunteer cor-

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employee with a disability as one who can perform the essential functions of a job with a reasonable accommodation. An analysis of the reasonableness of the Petitioner's proposed accommodations is made elsewhere in the County's Brief in Opposition.

[13] While not central to the issues raised by Huber's Petition, Huber misrepresents the facts when he asserts at pages 8 and 14 of the Petition that he was referred for medical evaluation when his "asthma" came to the attention of his training supervisor, and that the County requires its firefighters to be "asthma free". While Huber failed to disclose the severity of his condition to the County's physician, the County clearly hired Huber and placed him in its fire academy knowing he had asthma (Pet. App. 9-10, 28-29). Huber cannot, therefore, establish that he was discharged *solely* for reason of his asthmatic condition. The County's hiring of Huber with knowledge of his asthmatic condition, in fact, raised a strong inference that the County's discharge decision was not based upon irrational fears, patronizing attitudes, or stereotypes about the nature or effect of bronchial asthma. *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209 (4th Cir. 1994).

porations establish their own membership standards and do not require their volunteers to meet the requirements established for career firefighters, or to participate in the training and testing programs which the County establishes for its career firefighters (Pet. App. 9, 19; Resp. App. 4, 5, ¶¶ 60-61).

More significantly, however, the District Court correctly discerned from the stipulated record that volunteer firefighters, unlike career firefighters, have the discretion of not responding to a fire (Pet. App. 19; Resp. App. 5, ¶¶ 62-63). For example, and notwithstanding his bald assertion at page 6 of the Petition that his work as a volunteer was "unblemished", it bears repeating that Huber admitted in depositions that he had, on numerous occasions, declined from going on calls because he was not feeling well (Pet. App. 19).

Finally, an examination of the medical testimony advanced by both parties in this proceeding reveals that Huber's participation in fire operations as a volunteer is not predictive of his ability to perform the physically demanding duties of a career firefighter. As the lower courts noted, an affidavit submitted by the County's pulmonologist, Dr. Hayes, indicated that there was no medical plan or scheme which would permit Huber to perform firefighting duties without a risk of substantial harm to himself, co-workers, or members of the public. In Huber's deposition of Dr. Hayes, moreover, the County's pulmonologist quantified this risk as very high or probable, and certainly greater than a 50-50 chance. Dr. Hayes also stated that Huber's service as a volunteer meant little, given the unpredictable nature of asthma (Pet. App. 19; Resp. App. 11-12).[14]

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[14] Again misrepresenting the record which was before the District Court, Huber incorrectly states at page 17 of the Petition, without making any reference to record evidence, that Dr. Hayes did not quantify in his deposition whether the risk of substantial

Likewise, and ironically, Huber's own medical expert at no time stated that Huber's prior service as a volunteer provided evidence that Huber could perform the duties of a career firefighter without accommodation. Instead, in the same report in which he stated that Huber had asthma which was cold and exercise-induced, Dr. Gamble fully accepted Huber's assertions regarding his service as a volunteer, but nonetheless recommended the laundry list of accommodations which he stated would be necessary to reduce, not eliminate, the substantial risk of harm which was presented (Pet. App. 19, 31).

Upon the foregoing, it is apparent that the District Court did not, as Huber asks this Court to believe, ignore Huber's service as a volunteer firefighter (Pet. App. 25). To the contrary, the District Court examined the *specific job* of a career firefighter as it was required to do, *Arline*, 480 U.S. at 287 n.17, and discerned the significant differences between the two positions. Further, given Huber's admission that he had been unable to "answer the bell" as a volunteer, his inability to meet performance expectations in the fire academy, and his own expert's opinion that he could not safely perform the duties of any firefighting position without receiving a continuous series of medical evaluations which, if positive, would require the cessation of his emergency activities, there was simply no evidence upon which a jury could reasonably find for Huber. In fact, in the face of these undisputed facts, the trial judge had an affirmative obligation to prevent Huber's factually unsupported claims from proceeding to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, (1986).

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harm was "probable." This statement is simply untrue (Resp. App. 11-12).

II. THE DISTRICT COURT AND THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT WITHOUT ESTABLISHING THE "REASONABLENESS" OF THE ACCOMMODATIONS HE PROPOSED, HUBER COULD NOT SET FORTH A TRIABLE ISSUE OF FACT UNDER THE REHABILITATION ACT BY SIMPLY ALLEGING THAT THE ACCOMMODATIONS WOULD REDUCE, NOT ELIMINATE, THE LIKELIHOOD THAT SUBSTANTIAL HARM WOULD RESULT TO HIMSELF OR OTHERS SHOULD HE BE EMPLOYED AS A "CAREER FIREFIGHTER".

Huber also contends at page 17 of his Petition that a Writ of Certiorari should be granted because the Supreme Court "has never addressed whether the risk of harm must rise to the level of a mere possibility or whether it must rise to a level of a probability." Ignoring entirely the accommodations which his expert proposed, as well as the numerous federal court cases which squarely address this issue, including those cited specifically by the District Court, Huber relies instead upon several state court cases, which are readily distinguishable,[15] and argues that an employer must establish that a risk of harm to health and safety is probable before an appli-

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[15] In a futile attempt to locate case law supporting his position, Huber relies upon several decisions involving state discrimination laws, rather than the Rehabilitation Act. In each of the cases cited by Huber, *B&O Railroad v. Bowen*, 482 A.2d 921 (Md. Ct. Spec. App. 1984), *Office of Occupational Medicine and Safety v. Baltimore Community Relations Com.*, 594 A.2d 1237 (Md. Ct. Spec. App. 1991), and *Bucyrus-Erie Co. v. State Department of Industry*, 280 N.W.2d 142 (Wis. 1979), the employers conceded applicants could presently meet the requirements of the respective positions, but argued that the applicant's performance of the duties of the jobs would likely destabilize the applicant's physical conditions, thereby putting the applicants *themselves* in danger. In contrast, the County's employment decision was based upon its belief, supported by expert medical opinion, that Huber's chronic condition would preclude performance of his job responsibilities, both now and in the future, and place himself *and others* at risk.

cant or employee with a disability may be denied employment.[16] Presumably, under Huber's theory, an airline would be forced to hire a pilot who presented 50-50 chance of having a heart attack or seizure every time the pilot operated an airplane, simply because the risk of harm did not rise to the level of a probability.

A. An Accommodation Is Not Reasonable If It Either Imposes An Undue Financial Or Administrative Burden Or Requires A Fundamental Alteration In The Nature Of The Job.

Huber's Petition on this ground should first be denied because he did not establish in the lower courts that his asthmatic condition could be reasonably accommodated. No doubt recognizing that they are manifestly unreasonable, Huber conspicuously fails to detail the specific accommodations proposed by his medical expert. Similarly, Huber fails to reveal that the Fourth Circuit found it unnecessary to even determine whether Huber had proven that the accommodations would enable him to perform the essential functions of a career firefighter without either a possible or probable risk of harm to himself and others. Because it agreed with the District Court's reasoning that Dr. Gamble's accommodations were not reasonable and

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[16] Huber also unnecessarily invokes regulations promulgated to implement the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 ("ADA"). While the regulation found applicable by the lower courts, 29 C.F.R. § 1613.702(f), pertains to § 501 of the Rehabilitation Act, which itself refers to the duty of federal, rather than federally funded employers, the health and safety requirement under § 501 has been found to exist under § 504. *See Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991). Further, even assuming that the ADA regulations promulgated after Huber's discharge are properly applied, it is significant that Huber selectively quotes from these regulations and fails to note that the regulations also indicate that the *duration of the risk* and the *nature and severity of the potential harm* are two factors which must be considered in determining whether an individual poses a direct threat, not just the likelihood that some harm will occur. 29 C.F.R. § 1630.2(r).

would cause undue hardship to the County, the Fourth Circuit determined that the issue of the risk of harm presented was one of academic interest only (Pet. App. 37).

The applicable regulation to which the lower courts referred in making their decision that Huber had not established that his asthmatic condition could be accommodated, 29 C.F.R. § 1613.702(f), defines an otherwise qualified employee with a disability as one who can perform the essential functions of a job with a reasonable accommodation. The key word in this definition, of course, is "reasonable". "An accommodation is not reasonable if it either imposes 'undue financial or administrative burdens' . . . or requires 'a fundamental alteration in the nature of the program.'" *Arline*, 480 U.S. at 287 n.17 (citations omitted) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)).

As the Fourth Circuit cogently observed, Huber contended in his complaint that his condition could be accommodated with medication alone,[17] but supplied an opinion from a medical expert which did not support this contention (Pet. App. 36). Again, Dr. Gamble's only prescription for accommodating Huber was:

> The accommodations that I suggest are that the supervisors, who are all trained in auscultation, listen to him at the beginning of each workday of service.[18] If they found wheezes, rhonchi or rales

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[17] Huber, of course, was required to abandon this theory given the fact that his use of the inhaler during the fire academy did not assist him in successfully completing physical exercises (Pet. App. 10-11, 29), and since he could not explain why it was that he was unable to answer the bell as a volunteer if he was at all times able to perform the duties of a firefighter with medication or an inhaler alone (Pet. App. 19).

[18] Although Huber points to the continuous monitoring of his lungs as a reasonable accommodation, he fails to address the potential liability inherent in any such accommodation. It is self-evident

> then he should be referred to their medical department, where further determination of his work status can be made. In addition, when he is exposed to smoke while fighting a fire and has to report to his rehabilitation center that the EMS technician auscultate his lungs and again check for wheezes, rhonchis and rales. If he is found to have a problem, then he should again report to the firefighter's medical department for further evaluation.

(Pet. App. 31).

The District Court correctly identified and succinctly summarized both the unreasonableness and the hardships inherent in Dr. Gamble's proposed accommodations. The District Court stated:

> To begin with, contrary to Dr. Gamble's assumption, the County Fire Department has no on-site medical department or rehabilitation center, and commonsense suggests that establishing and maintaining such departments to accommodate plaintiff would entail substantial cost. Moreover, the fact that plaintiff's lungs are clear at the start of the day would not guarantee that Huber's lungs would remain clear at the scene of a fire or at any other time during a work shift. Even if Huber were further examined at the site of a fire, his potential incapacitation could require that he be removed from service. That contingency would mean that the County would have to increase its staffing requirements at stations to which Huber is assigned in order to have enough active firefighters at the scene.

(Pet. App. 23)

The accommodations proposed by Dr. Gamble, moreover, are inherently unreasonable because they require the

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that Huber's co-employees, as well as the County, by permitting or endorsing such an accommodation, expose themselves to liability in the event that Huber suffers an asthma attack after a co-employee, who is not a licensed physician, determines that the condition of his lungs enables him to perform.

County and its employees to make a continuous series of evaluations as to Huber's readiness to perform his job. As the District Court observed, 'Huber has not provided or even proffered evidence that he can perform the most essential function of a career firefighter, namely to be available, in a healthy physical condition at any, random moment during his shift—'in spite of his handicap' " (Pet. App. 20) (quoting *Davis*, 442 U.S. at 406). As an employer, the County is not required to make continuous determinations as to whether its firefighters, on any given day or at any given moment, are physically capable of performing their job. Such a requirement would render meaningless this Court's mandate in *Davis*, 442 U.S. 397, which extends the protections of the Rehabilitation Act to disabled persons who can perform *in spite of* their disability. Huber asked the lower courts, in effect, to order the County to lower its fitness standards by measuring Huber's physical fitness on a continual basis. Such a result is not an "accommodation" at all, but rather is a fundamental alteration of the career firefighter position. *See Jasany v. United States Postal Service*, 755 F.2d 1244, 1250-1251 (6th Cir. 1985) (holding that an employer is not required to accommodate by eliminating one of job's essential functions); *Davis*, 442 U.S. at 413 (holding that the Rehabilitation Act imposes no requirement to lower or to effect substantial modifications of standards to accommodate a disabled person).

Reduced to its simplest terms, Dr. Gamble's recommendation was that Huber should be allowed to work only when his physical condition permitted. This proposed accommodation asked for more than the law required and would place an undue hardship on the County. *See Walders v. Garrett*, 765 F. Supp. 303 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992). As stated previously, an accommodation is simply not reasonable if it imposes undue financial and administrative burdens, or requires a fundamental alteration in the nature of the job. *See Arline*, 480 U.S. at 287 n.17. *See also Dexler v.*

Tisch, 660 F. Supp. 1418, 1427-29 (D. Conn. 1987) (not assigning a normal task to handicapped employees, doubling up tasks, or measures that will cause significant loss of efficiency may constitute undue hardship); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982) (employer not required to adopt accommodation that would reduce efficiency to non-acceptable level). At most, determining whether Huber's lungs were clear during a fire emergency might reduce the risk of harm to Huber. This accommodation, however, would not answer the question of how the County was to then conduct effective fire operations.

B. An Individual Who Cannot Perform The Essential Functions Of A Job Requiring The Performance Of Safety Sensitive Functions Without Endangering The Health Or Safety Of Himself Or Others Is Not "Otherwise Qualified".

Even if Huber had established the reasonableness of his proposed accommodations, his Petition would nevertheless rightly be denied because this Court has stated that nothing in the language or history of the Rehabilitation Act reflects an intention to limit the freedom of employers to require reasonable physical qualifications. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). A determination of the reasonableness of physical qualifications, of course, necessarily entails an evaluation of the job itself, its setting, and the nature and severity of the hazards which are presented both to the employee and others. Indeed, federal courts considering this issue have consistently held that an employer faces a lesser burden with respect to establishing both the job-relatedness and the reasonableness of physical qualifications where there is a demonstrable need for a particular ability in the performance of safety-sensitive functions. *See DiPompo v. West Point Military Academy*, 770 F. Supp. 887, 892 (S.D. N.Y. 1991), *aff'd*, 960 F.2d 326 (2nd Cir. 1992) (holding that a dyslexic volunteer fire-

fighter who sought to be employed as a career firefighter was not otherwise qualified since his inability to read and identify words and symbols could pose a significant danger to himself and to others in emergencies); *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991), *cert. denied*, 503 U.S. 959 (1992) (holding that persons with a history of epilepsy and the use of anti-convulsive medication could be disqualified from driving a commercial truck because of the risk of injury to themselves and others); *Serrapica v. City of New York*, 708 F. Supp. 64, *aff'd*, 888 F.2d 126 (2nd Cir. 1989) (holding that an individual with diabetes was not qualified to operate heavy sanitation equipment in traffic because of the risk of injury to himself and others); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) (holding that an insulin-dependent diabetic was not qualified to be an FBI agent because of the risk of dire consequences which would be presented if an agent were to suffer an incident while on duty). None of these cases required the employer to show that the risk of harm was "probable".

In this proceeding, however, the County's pulmonologist, Dr. Hayes, quantified the risk of substantial harm posed to Huber and others as "probable" should Huber be employed as a career firefighter, and stated that there is no medical plan or regimen which would enable Huber to perform the duties of a career firefighter (Pet. App. 12, 30; Resp. App. 11-12). Dr. Gamble, Huber's own expert, stated that even with his proposed accommodations, which are patently unreasonable for the reasons previously stated, Huber would still pose a ten percent risk of danger to himself and others if he were to be employed as a career firefighter (Pet. App. 25). Thus, given the life and death circumstances which face career firefighters on a daily basis, the District Court was right to conclude that the County was not legally required to assume such a risk upon the foregoing authority, which

Huber has neither discussed nor distinguished (Pet. App. 25).

CONCLUSION

As the foregoing indicates, the decision of the Fourth Circuit is consistent with decisions of other United States courts of appeals, as well as the decisions of this Court on the same matters. Thus, there is no important question of federal law which has not been, but should be, settled by this Court. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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September 15, 1995

APPENDIX

APPENDIX

[Filed Feb. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. K93-606

JOHN HUBER,

Plaintiff

v.

HOWARD COUNTY, MARYLAND,

Defendant

AGREED STATEMENT OF FACTS

1. Howard County, Maryland ("County") is a chartered County formed pursuant to the legislative grant of authority contained in Article 25A of the Annotated Code of Maryland.

2. Prior to the adoption of the Charter form of government by Howard County voters in 1969, fire, rescue and emergency medical services were controlled by volunteer fire corporations. These corporations were formed and presently exist as non-profit corporations under Maryland law.

3. In adopting the Charter form of government in 1968, voters in Howard County, Maryland approved Section 413 of the Howard County Charter ("Charter") which recognized the concurrent existence of the existing volunteer fire corporations and the Department of Fire and Rescue Services created by the Charter. Section 413 of the Charter was repealed and reenacted as Section 1110 of the Charter by Council Bill 69 of 1980, which was

approved by the voters of Howard County, Maryland on November 4, 1980. Then, pursuant to Section 403 of the Charter, "Reorganization of the Executive Branch", the County Council deleted Section 1110 of the Charter by Council Bill 62 of 1988, and enacted and added Section 17.100, "Department of Fire and Rescue Services" to Subtitle 1 of Title 17 of the Howard County Code. These Charter and Code provisions are attached, collectively, as Exhibit 1.

4. Since the adoption of the Charter, fire and rescue services in the County have been provided by the membership of the six (6) separate and independent volunteer fire corporations and employees of the Howard County Department of Fire and Rescue Services. The employees of the Howard County Department of Fire and Rescue Services may be assigned to stations owned by the independent volunteer fire corporations, or to stations owned by Howard County, Maryland.

5. Since the adoption of the Charter, six representatives from the volunteer corporations located in the County have served on a fire and rescue services board which has acted as a link between the County and the independent volunteer fire corporations.

* * * *

48. As the position descriptions indicate, firefighting and emergency response operations are physically demanding jobs. These emergency functions may be performed under very difficult conditions and may require work at or near maximal heart rates for periods of time. Heavy protective equipment, typically weighing in excess of forty pounds, including respirators, contributes to the physical requirement.

49. As the position descriptions also suggest, firefighting personnel may be exposed to toxic substances during their work including carbon monoxide, cyanide, acrolein, hydrogen chloride, nitrogen dioxide and benzene. Hazard-

ous materials incidents and burning plastics may involve exposures to many other toxic materials.

50. As the position descriptions also suggest, firefighter and emergency response personnel must perform in a variety of weather environments.

51. The Howard County Department of Fire and Rescue Services instructs firefighters not to run at the scene of an emergency.

52. Generally speaking, on a shift-by-shift basis, a firefighter employed by the County can be required to perform as the driver of a ladder truck, engine or rescue squad vehicle, as an officer of a ladder truck, engine or rescue squad vehicle, as a firefighter on a ladder truck, engine or rescue squad vehicle; or as an ambulance driver or a member of an ambulance crew.

53. As a driver, the duties of a firefighter employed by the County include, but are not limited to making apparatus checks and repairs, driving apparatus to and from emergency calls, acting in the capacity of truck operator, pump operator or rescue squad vehicle operator on the scene of emergency calls and performing duties of a firefighter.

54. As an Officer, the duties of a firefighter employed by the County may include leading and supervising firefighters assigned to a piece of fire apparatus and performing the duties of a firefighter.

55. As a firefighter, the duties of a firefighter employed by the County include pulling charged and uncharged hoselines, throwing and raising ground ladders, opening holes in roofs and walls using an axe or various other tools, and gaining entry through a locked door.

56. The duties of a firefighter employed by the County may also include the operation of heavy duty extrication tools, the participation in salvage and overhaul operations to include moving furniture, removing ceilings, and the putting into service of standpipe packs in highrise buildings.

57. The duties of a firefighter employed by the County are often performed in full protective equipment, including breathing apparatus.

58. The duties of a firefighter employed by the County as an ambulance driver or member of an ambulance crew include carrying equipment to the scene of an emergency, often up multiple flights of stairs, and carrying patients on stretchers from emergency scenes to the ambulance, as well as unloading the same patients at the hospital. Duties in this role also include performing various emergency skills such as patient assessment, controlling bleeding, airway maintenance, cardiopulmonary resuscitation and splinting fractures.

59. In addition to these activities, firefighters employed by the County are often required to make building inspections, public presentations, public education, investigations of the cause and origin of fires, and to conduct training and in-service training.

60. In addition, firefighters employed by the County are required to participate in physical training exercises and to submit to physical agility testing and a medical examination on an annual basis. The physical agility test in the years 1985 to 1992 consisted of a 1½ mile run, chair dips and sit-ups against an age-based scale (Exhibit 16). In 1993, the physical agility test was changed and is now comprised of the performance related tasks specified in Exhibit 17. Failure to successfully complete the physical agility test or medical examination may result in retesting, fitness for duty evaluations, removal from operational activities or recommendations for retirement or dismissal.

61. Individuals who are members of a volunteer fire corporation and volunteer their services to the volunteer fire corporations are not required to meet all of the requirements established for career firefighters, and are not

required to participate in County sponsored in-service training, physical training, or physical agility testing.

62. Members of the volunteer fire corporations may perform the functions required of career firefighters but are not required to perform the functions of career firefighters. For example, members of volunteer fire corporations may choose not to respond when an emergency call is made or may choose to limit the functions which they perform during a fire emergency. A member of a volunteer fire corporation who is qualified to drive a vehicle but who cannot physically climb or lift a ladder may, for example, drive a vehicle during an emergency but may choose not to participate in other operational activities.

63. Numerous members of volunteer corporations, however, perform some but not all operational activities.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. K 93-606

JOHN HUBER,

Plaintiff

v.

HOWARD COUNTY, MARYLAND,

Defendant

Pursuant to Notice, the deposition of JAMES L. GAMBLE, M.D. was taken on Thursday, January 27, 1994, commencing at 2:06 p.m., at Med. Therapy, 3310 Eastern Avenue, Baltimore, Maryland 21224, before Kelly Weitzel Alford, a Notary Public.

* * * *

[6] Q Okay. Anything else?

A No.

Q Did you receive any awards or honors from the Johns Hopkins University School of Hygiene and Public Health?

A No.

Q At the University of Miami School of Medicine you received your degree in 1974, correct?

A That's correct.

Q Did you take any specialized courses there?

A No. It was just—I mean that's the straight—well, you get to do your senior rotations but that's about it.

Q Okay. As far as your internship, did you do an internship?

A Union Memorial, straight medicine.

Q What about residency?

A That was a combination of Johns Hopkins and University of Cincinnati and Dow Chemical.

Q Okay. And what did you study during the [7] course of your residency?

A Occupational medicine.

Q When you say occupational medicine, was there any other program or specialty studied within the field of occupational medicine?

A Well, it was a combination of epidemiology and there were some rehabilitative medicine, a lot of toxicology, you know, some dermatology and some material about disability evaluations.

Q Did you study anything relating to pulmonology?

A Yes.

Q What was the course of study that you followed with respect to pulmonology?

A I don't recall the exact nature, I mean the name of the course, but there was an extensive study of pulmonology, including asthma, black lung, that sort of thing.

* * * *

[11] Q Are you on the staff of any hospitals currently?

A No.

Q Are you affiliated with or have any privileges at any medical institution at the present time?

A No.

Q Do you have any teaching appointments? I don't see any noted on your CV.

A No.

Q As far as your professional memberships which are noted on the CV, you have first the American College of Occupational Medicine, what is the membership requirement for that, if any?

A Pay your dues.

* * * *

[15] Q Okay. Have you ever testified on behalf of a defendant?

A No.

Q Were you ever qualified in any court as an expert in the field of pulmonology?

A Never.

Q Other than your testimony—

A In a court?

Q In a court, yes.

A No, I have not been—no one has ever asked me to be qualified.

Q Have you ever testified before administrative agencies?

A What do you mean by—I don't know what I'm—

Q Well, tribunals other than courts, agencies, Workmen's Compensation Commission?

A Workmen's Compensation Commission I had.

Q Okay. And since January of 1988 how many times have you testified before the Workmen's [16] Compensation Commission?

A Once, once.

Q Once. Was that on behalf of a claimant or an employer?

A A claimant.

Q Have you provided testimony—you've indicated that you provided testimony in depositions?

A Uh-huh.

Q Since January of 1988 to the present, how many occasions have you provided depositions?

A Oh, I don't know, probably about six.

Q When you've given the depositions has it been on behalf of a plaintiff or a defendant?

A On behalf of a plaintiff.

Q Okay. And—

A The plaintiff attorneys don't like us, I mean I wouldn't mind doing defendant work also, but plaintiff attorneys don't like people switching sides.

Q Do you work frequently with plaintiffs' attorneys?

A Yes.

[17] Q What plaintiffs' attorneys do you work with?

A I have about 200 that we work with.

Q Okay. And what is the nature of your work with them?

A Well, workmen's comp, automobile accidents primarily.

Q And what type of duties do vou perform for them?

A Well, we treat their patients, get them better and write reports so that the, to describe the care that they received and when necessary then we testify.

Q In terms of your present employment, I picked up a card out front, the name of the organization for which you worked is Med. Therapy; is that correct?

A Right.

Q What interest, if any, do you have in Med. Therapy?

A All of it.

Q Well, you're the owner of Med. Therapy?

A Yes.

[18] Q And how many employees does Med. Therapy have?

A I'm not sure. I think about 12.

Q Okay. And how many physicians are employed by Med. Therapy?

A Just myself.

Q What are the scope of your duties currently for Med. Therapy?

A Administarative, disability evaluations, patient care, I do some of the physical therapy too.

Q Are all the clients and patients whom you serve referred to you by attorneys for evaluation?

A No, we have some people that come for, we have some medical assistance practice and we, sometimes patients come to us because we have a reputation for taking care of people well.

Q You indicate that you do work for about 200 plaintiffs' attorneys. What percent of your business is referred to you by plaintiffs' attorneys?

A Probably—I don't know, I've never really measured it, but I would guess it's about 60 percent.

* * * *

[20] Q So since—

A It would be basically '89, I think.

Q Well, in our CV you indicate that you've been involved in private medical practice in Maryland since January of '88?

A I had an office on Read Street at that time.

Q Okay. And what was the nature of your practice on Read Street?

A Basically the same thing that we do here.

Q Was there a name to that business on Read Street?

A No.

Q Were there any other doctors employed at your address on Read Street?

A No.

Q Doctor, what percent of the income of Med. Therapy, Inc., approximately comes from work that is referred to you by attorneys, plaintiffs' attorneys?

A What part of the income?

Q Yes.

[21] A I would, again, I don't know because I've never really measured it, but probably about 90 percent.

Q Since January of 1988 to the present, Doctor, approximately how many asthma patients have you treated?

A '88 to present?

Q Yes.

A Probably about eight. Probably more than that. Now that I think of it probably more like 20.

Q What was the nature of the treatment that you provided?

A Well, here is basically bronchodilators. Elsewhere it was we would use, I mean or while I was working at Johns Hopkins Urgent Health Care Plan and then we'd use the ventilators and that sort of thing.

Q When you speak of the Johns Hopkins Health Plan Urgent Care Center, your CV indicates that you were associated there between September of 1988 and 1989, when did you terminate your association there, what months of 1989?

A I don't know, I can't remember.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. K-93-606

JOHN HUBER, M.D.,

Plaintiff

vs.

HOWARD COUNTY, MARYLAND,

Defendant

The Deposition of MICHAEL G. HAYES, M.D. was taken on Friday, January 21, 1994, commencing at 2:20 p.m., at Maryland General Hospital, 827 Linden Avenue, Baltimore, Maryland before Sandra D. Jerosimich, Notary Public.

* * * *

[12] In this instance, I'm trying to sort of cut this off at the pass before it gets started. Had he come to me and wanted to go into the painting business, I would have said are you out of your mind? That's not a job that an asthmatic should go into. The risk is, yes, much higher for you than it is for someone else, for somebody who has normal airways.

Q. Well, to take your example and to apply it into this case, perhaps, when you talk about Mr. Huber incurring some additional risk and additional problems, are you talking about him becoming disabled further as a result of this occupation of firefighter?

A. Absolutely.

Q. Okay. And are you talking about that as a possibility or probability?

A. Probability.

[13] Q. Meaning what?

A. Well, again, can I predict the outcome? There's so many variables, you can't ask me to do that. I mean, if you told me what his conditions were going to be the entire time, you know, maybe I could be a little more

specific, but again, there are a lot of variabilities, but the point is that unless you're going to tell me that he's going to be an office firefighter, if you're going to tell me that he's not going to be exposed to any inhalants of any kind, then his risk is greater.

Q. Greater than someone without—

A. Greater than normal, greater than someone with basically normal airways.

Q. Okay. Can you quantify that risk?

A. No, but I think it's high. I can't give a number to it, but I mean, much better than a 50/50 chance, I think, of having serious deleterious effects particularly over any length of time. It could be that he would go to his first fire and have a severe asthma attack and die on the [14] spot. It may be that he didn't.

Q. Does the seven years of experience that he's had indicate anything to you?

MR. BASEHOAR: Objection.

A. No.

Q. Why not?

A. For the example that I talked about before, that it could happen, he could get into a very serious business one episode or it might not be for ten episodes. I mean, the problem with asthma is that it's so unpredictable that the person can be fine one minute and so, so distressed in the next minute, I ain't talking about a few, you know, hours, I'm talking about minutes here that, you know, terrible things can happen in a very short period of time. I mean, all the seven years tells me is that, as I say, that I suppose that's what sort of led him to this. I mean he felt that if he had done that and had gone reasonably well that therefore, that goes on for a lifetime, but I don't think that's predictable and [15] I think that the statistics that you have, I don't have them at my fingerips, that you have that talk about pulmonary complications of fire fighting just add to the fuel, fuel to the fire, if you will, to pun a little, to the situation.

* * * *